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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 510

C. H. COCHRAN,

Petitioner,

vs.

THE STATE OF KANSAS AND MILTON F. ARMINE,
WARDEN, KANSAS STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE PETITIONER.

H. THOMAS AUSTERN,
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THE STATE OF KANSAS AND MILTON F. AMRINE, WARDEN, KANSAS STATE PENITENTIARY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Supreme Court of Kansas (R. 60-63) is reported in 153 Kan. 777, 113 P. (2d) 1048 (1941).

Jurisdiction.

The judgment of the Supreme Court of Kansas was entered June 7, 1941 (R. 59). Motions for rehearing, for subpoenas to witnesses and for stay of judgment were denied

July 3, 1941 (R. 72). The petition for writ of certiorari was filed August 13, 1941 (R. cover) and was granted October 13, 1941 (R. 72). The jurisdiction of this Court rests upon Section 237(b) of the Judicial Code, as amended.

Questions Presented.

1. Whether the action of prison wardens and other State officials in forcibly preventing petitioner from pursuing a criminal appeal afforded by State statute until after the time for such appeal had expired, was in violation of the equal protection clause of the Fourteenth Amendment.

2. Whether, if such discriminatory action was a denial of a constitutional right guaranteed by the Fourteenth Amendment, the commitment under which petitioner is being held is constitutionally void.

3. Whether denial to a defendant in a criminal prosecution of the use of compulsory process for witnesses in his defense is a violation of the due process clause of the Fourteenth Amendment.

4. Whether denial to a defendant in a criminal prosecution of the right, upon his so requesting, to testify in his own defense is a violation of the due process clause of the Fourteenth Amendment.

5. Whether the factual determinations of the court below have any support in the record.

6. Whether the court below erred in refusing to afford petitioner an opportunity to prove the issues of fact controlling the constitutional validity of his detention.

Constitutional Provisions and Statutes Involved.

The relevant provisions of the Federal and Kansas Consituations, and Kansas statutes are set forth in Appendix A.

Statement of Facts.

On January 8, 1941 petitioner filed an original application for a writ of habeas corpus in the Supreme Court of Kansas (R. 2-20). Petitioner alleged that he was imprisoned by the respondent, the Warden of the Kansas State Penitentiary at Lansing, Kansas, pursuant to a sentence and commitment for life by a Kansas District Court; and that his imprisonment was unlawful for a number of reasons, *inter alia*, that the trial resulting in his conviction and commitment had been constitutionally invalid for lack of due process, that following his imprisonment he had been unlawfully prevented by prison officials and other authorized officers of the State from pursuing the rights of appeal afforded by State law to correct reversible errors in his trial, and that, after the time for appeal had expired, he had been prevented from obtaining relief through habeas corpus (R. 3-4). To the petition were annexed: (1) a brief and statement of authorities (R. 5-7); (2) a verified Statement of Facts (R. 7-13); (3) a copy of the journal entries, verdict, and judgment of the trial court;[1] (4) a series of affidavits by petitioner himself supporting the allegations (R. 14-16); (5) a "motion" for an order directing that the transcript of the trial in the Kansas District Court be certified to the Supreme Court (R. 16); and (6) a series of affidavits by petitioner and others in support of his allegations (R. 17-20).

The Application.

Taken together these documents alleged that on April 13, 1933, petitioner had been arrested on a warrant charging the crimes of both forging and knowingly passing a

[1] These appear in the record on file in this Court (fol. 15) but have been omitted in printing at R. 14, since they appear in identical form in the printed record at R. 44-47.

worthless check in the amount of $12.60 (R. 7). On May 15, 1933 he was brought to trial. With respect to his trial, petitioner charged a series of errors which would have been ground for reversal on appeal had he not later been prevented from appealing. *First*, he claimed that he had been deprived of the right to compulsory process to secure witnesses for his defense. Specifically, he alleged that on April 27, 1933, he had asked that six named witnesses who could establish his innocence be subpoenaed (R. 7-8), and that

> "All of these material witnesses were excluded from the list to be subpoenaed for the trial and were not present" (R. 8).

He further alleged that at the trial on May 15, 1933, his request for these witnesses was renewed but that they were never called in his defense (R. 8). As a *second* basis for error during the course of the trial, petitioner alleged that the prosecuting County Attorney had unlawfully and erroneously stated to the jury that the defendant was an ex-convict who had been convicted several times before for forgery (R. 8); *third*, that his request that he be permitted to take the witness stand in his own defense had been denied (R. 9); and *fourth*, that the verdict had not been supported by the evidence (R. 10).[2] Each of these errors was substantial and under Kansas law would have been grounds for reversal on appeal.[3]

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[2] Other errors, less clearly set forth, are also charged and are respectfully submitted for the consideration of this Court. These apparently involve refusing the defendant permission to examine the jury on *voir dire* (R. 8) and prejudicial testimony on the witness stand by defendant's own counsel (R. 9).

[3] *Compulsory process:* KAN. CONST., Bill of Rights, Sec. 10, KAN. GEN. STAT. (Corrick, 1935) Secs. 62-1309-12, both quoted in Appendix A, *infra*, pp. 56-57; *State* v. *Roark*, 23 Kan. 147 (1879). *Prejudicial conduct of County Attorney: State* v. *Alexander*, 89 Kan. 422, 131 Pac. 139 (1913); *State* v. *Netherton*, 128 Kan. 564, 279 Pac. 19 (1929). *Right to testify:*

The trial resulted in a verdict of guilty on the charge of knowingly passing a worthless check for $12.60 and an acquittal on the charge of forging this check (R. 10, 45). On May 29, 1933, petitioner was sentenced to a term of life imprisonment at hard labor as an habitual criminal[4] (R. 46).

So much for the trial court proceedings and the alleged reversible errors and constitutional invalidity. The application for habeas corpus and verified attachments further alleged that from the time of his imprisonment on May 31, 1933, the prison authorities and other officials of the State had maintained a "blockade" against him, had confiscated all letters and documents sought to be filed with the courts, and had thus forcibly prevented him from exercising his lawful rights to appeal the conviction and sentence to life imprisonment (R. 3). Specifically, petitioner alleged, *first*, that an attempt on his part to file a motion for a new trial on the basis of newly discovered evidence showing his innocence had been blocked by the confiscation of his motion and affidavits by the prison authorities (R. 10); *second*, that he had been forcibly prevented from filing an appeal until the two-year period for appeal had expired (R. 6, 10, 17-18); and *third*, that for some time thereafter he had been prevented from applying for habeas corpus (R. 10). The application stated that petitioner had specific evidence showing that the Warden and named Deputy Wardens, the

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Cf. KAN. GEN. STAT. (Corrick, 1935) Secs. 62-1420-21. *Verdict not supported by evidence: State* v. *Ridge*, 144 Kan. 402, 61 P. (2d) 109 (1936). Moreover, in our argument we contend that under the due process requirements of the Fourteenth Amendment the denial of compulsory process and the refusal to permit defendant to testify in his own defense, rendered the commitment constitutionally void under the Federal Constitution. *Infra*, pp. 36-53. On appeal in the State court these issues could have been raised.

[4] KAN. GEN. STAT. (Corrick, 1935) Sec. 21-107a. Conviction for a third time of a felony carries a life sentence. Neither of the alleged former convictions had been related to forgery, and petitioner has consistently urged that the first, for theft of an automobile (R. 46), was invalid because he was a minor at the time (*Petition for Certiorari*, p. 38).

State Pardon Attorney, and other officials and agents of the State had collaborated in this "blockade" and that letters to his attorneys and others had been destroyed (R. 3, 11, 13, 17). In support of these allegations he submitted copies of various communications from the Warden (R. 11); an affidavit alleging that on June 3, 1933 and again on June 10, 1933 petitioner had mailed his appeal papers to the Kansas Supreme Court and that these had been confiscated and destroyed by the Deputy Warden (R. 18); and supporting affidavits of three other persons substantially corroborating petitioner's attempts to file an appeal immediately following his imprisonment (R. 17-18).

Finally, petitioner alleged that in 1935 he had succeeded in filing [5] an application for habeas corpus which was considered by the Kansas Supreme Court, *Cochran* v. *Simpson*, 143 Kan. 273, 53 P. (2d) 502 (1936). He asserted that this earlier application had not raised the issues now presented in that it

> "never at any time brought forth the act of the Lacy M. Simpson, Warden, E. M. Stublefield, Deputy Warden, Nor the acts of the [trial] court of Sumner County as an issue to be decided" (R. 14).

Petitioner's affidavit stated that the reason these questions had not been presented was that "being a layman the petitioner never realized that the officials had no Authority to deny a lawful appeal" (R. 14).

Preliminary Rulings.

Two months after filing his application for habeas corpus in the Kansas Supreme Court, petitioner on March 11, 1941

[5] Not through the prison mails but by getting it through an "underground method" to his sister (R. 14). *Cf. Ex parte Hull*, 312 U. S. 546, 548 (1941). The reference at R. 14 to "1936" is obviously a misprint since the case number given by petitioner identifies the application as that filed in 1935 and decided in 1936 in *Cochran* v. *Simpson, supra*.

filed a motion for leave to appear before the court to present his evidence in support of the allegations in the application (R. 20).

Consideration of the application in the court below was quite confused. Nothing was done for two months. Then, on March 15, 1941, the Supreme Court ordered the original application for habeas corpus docketed (R. 21). By the same order the Supreme Court consolidated petitioner's original application with his appeal from an order of the Kansas District Court denying a similar application for habeas corpus, and directed the petitioner, as an appellant pursuant to the Kansas practice, to file an abstract and a brief (R. 21).[6] Decision on petitioner's motion to appear before the Court was postponed[7] (R. 21).

Respondent's Return.

On April 17, 1941 respondent filed a return (R. 37), to which were attached (1) copies of the judgment and sentence, the information, and the journal entries of the trial court (R. 40-47); (2) a copy of a letter from the County Attorney to the Warden of the Kansas State Penitentiary recommending "that you keep this party under close supervision at all times, otherwise he will cause you trouble" (R. 48); (3) an affidavit by the County Attorney stating that the facts alleged with respect to improper argument by him were untrue (R. 49); and (4) a copy of petitioner's

[6] The record facts concerning this appeal and the manner in which it was treated by the Kansas Supreme Court are set out in the Appendix. *Infra*, pp. 65-68. For purposes of consideration in this Court the allegations in the original application and verified attachments, the statements in the respondent's return, subsequently filed, and the petitioner's traverse thereto, alone need be considered.

[7] On March 18, 1941 petitioner renewed his motion to appear before the Kansas Supreme Court, pointing out that he was without counsel and that he wanted an opportunity to present his evidence (R. 21-22). On April 14th he filed a further document entitled a Motion to Sustain Petition in which he protested against further delay (R. 35-36).

fingerprint record on file in the United States Bureau of Investigation (R. 53). In addition, counsel for respondent filed a brief which stated that the charges that the Warden and other State officials had prevented petitioner from appealing were "ambiguous and unsubstantiated" (R. 55).

Petitioner's Traverse and Offers of Proof.

On April 23, 1941, petitioner filed an Answer to Respondent's Brief and Abstract in which he stated that his allegations were true and could be proved and that the statements in the return were untrue (R. 56-57). Though captioned as an Answer to Respondent's Brief and Abstract, this document may properly be taken as an answer and traverse to the return. *Cf. Lee* v. *Prather*, 146 Kan. 513, 71 P. (2d) 868 (1937).

On May 5, 1941, the Kansas Supreme Court made an entry in the consolidated case, stating that "this cause comes on for hearing upon the appeal papers and the abstract of record from the district court" and that the case had been "submitted upon the briefs of both parties and taken under advisement by the court" (R. 57).[8] On May 10, 1941, petitioner filed a series of Objections to Procedure of Court in which he objected to the consideration of the cause without opportunity to present evidence in support of his application (R. 58-59).

Decision and Opinion.

On June 7, 1941, the Supreme Court denied the original application for habeas corpus and dismissed the appeal from a similar denial in the district court (R. 59). Its opinion, filed the same day, indicates that the court based its

[8] For discussion of the petitioner's and possibly the lower court's confusion between the appeal from the district court application and the original application for habeas corpus in the Kansas Supreme Court, see Appendix C, *infra*, pp. 65-68.

judgment alone upon a consideration of the original application, the return, and to some extent on statements in respondent's brief and abstract (R. 60-63).

Viewed in the light of the Federal questions raised by petitioner, the opinion of the court below does not clearly indicate its basis for decision. On the question whether forcibly preventing petitioner from exercising his right of appeal was a denial of equal protection, the court apparently refused to accept petitioner's affidavits and offers of proof on the theory that his failure to include this ground in his earlier application for habeas corpus wholly destroyed their credibility.[9] It stated that

> "There is nothing in the record to indicate that the petitioner attempted to appeal his case to the Supreme Court." (R. 62).

While admitting that

> "Soon after the petitioner was confined in the penitentiary he made some effort to file a habeas corpus petition. *Under rules then prevailing at the penitentiary these were not permitted to be sent out, and this much of the allegations of the petitioner in this case has some basis*" (R. 62, *italics supplied*),

the lower court suggested that these conditions did not long prevail and that because petitioner in October, 1935,

[9] There is no claim in the present case that the decision below on this point turned on an adequate non-federal ground. As will be noted below, the Kansas Supreme Court did not take the position that under State law the Federal questions raised could not be examined on habeas corpus. Not only does Kansas law permit such inquiry but in the present case the court considered the issue of discriminatory denial of appeal. *Infra*, pp. 17-24. Nor did it base its decision on the view that in Kansas the doctrine of *res adjudicata* applies to habeas corpus. This is not the Kansas law, and respondent agrees that the opinion below is not to be so interpreted. *Respondent's Motion To Dismiss*, p. 12. The only hearing of the previous application for habeas corpus was on the issue of fact as to whether petitioner had in fact attempted to appeal his original commitment.

had finally succeeded in filing a habeas corpus petition in which he did raise this ground, his affidavits and offers of proof could not be accepted.

> "Some of the questions sought to be raised in this proceeding were presented to the court at that time. All of them might have been and should have been presented in that proceeding. While a court should be liberal in entertaining habeas corpus proceedings, there is no reason to reconsider the same questions repeatedly." (R. 62).

On the asserted violation of the Fourteenth Amendment in the denial of compulsory process for witnesses and the refusal to permit petitioner to testify in his own behalf, the court below in effect refused to consider these issues. The allegations concerning them had not been controverted in the return. The court below had not granted petitioner's request that the transcript of the trial be secured or permit him to prove his allegations in open court. The opinion recites that it entertained the "case only because of plaintiff's allegations respecting the records in the trial court" (R. 62-63). Yet without the trial transcript or other proof concerning the trial before it, the court concluded

> "There is nothing in the record of the proceedings in the court below to indicate any irregularity in the petitioner's trial and conviction, and certainly nothing to indicate that his commitment was void for any reason." (R. 62).
>
> . . . . . .
>
> "No evidence has been offered to support these allegations other than the bare statement of the petitioner. The records of courts are not set aside upon the unsupported statements of a defeated litigant" (R. 63).

On this basis it denied the application (R. 59).

Petitioner's Further Offers of Proof.

On June 27, 1941, petitioner moved for a rehearing on the ground that the court's rejection of his application, without affording a trial on the issues of fact controlling the validity of his commitment, constituted a denial of a proper judicial inquiry on habeas corpus. He also charged that various affidavits had been removed from his original application and withheld from the court (R. 63-64). See Appendix B, *infra*, pp. 61-65. On the same day he filed a Motion for Stay of Judgment on substantially the same grounds, again asserting that the affidavit of the County Attorney was untrue (R. 65-66). At the same time he filed a Motion to Subpoena witnesses setting forth the names and addresses of seven witnesses whose testimony would support his application (R. 66). Accompanying this motion were four affidavits by these desired witnesses and others, in support of the charge in his original application that he had been forcibly prevented from filing any appeal, and copies of correspondence offered to show that statements in the affidavit of the County Prosecutor accompanying the return were incorrect (R. 67-71).

On July 3rd the Kansas Supreme Court denied each of these motions (R. 72).

On August 13, 1941, petitioner applied for certiorari which was granted on October 13, 1941 (R. 72-73).

Summary of Argument.

We contend that petitioner's application for a writ of habeas corpus specifically set forth three bases for asserting that his detention by respondent was constitutionally invalid. First, that the acts of the prison wardens and other State officials in forcibly and discriminatorily preventing him from appealing his original conviction within the time in which an appeal could be filed, was a denial of the equal

protection of the laws. Second, that denying him the right to compulsory process to secure witnesses for his defense at the trial was a deprivation of due process. Third, that preventing him from taking the stand to testify in his own behalf, when he requested to do so, was also a deprivation of due process. Each of these constitutional invasions rendered the original commitment void.

Under the law of Kansas each of these asserted grounds of invalidity under the Federal Constitution was open to inquiry on habeas corpus. As to the first, the court below apparently went no further than the question of fact whether an appeal had actually been sought and prevented; it took the position that petitioner's affidavits and offers of proof could not be accepted because his failure to assert this ground for relief in an earlier application for habeas corpus rendered any evidence he might bring forward unworthy of belief. On the second asserted ground of invalidity, based on denial of compulsory process, it is difficult to determine exactly what the lower court did other than that it refused to give petitioner an opportunity to prove his specific and uncontroverted allegations. On the third, it apparently did not even consider the question.

I.

In our argument we deal first with the determination of the lower court on the controlling question of fact whether petitioner attempted to appeal from his original conviction in 1933 and was thwarted by the prison wardens and State officials. The application as a whole reveals complete specificity of allegation on this point. The types of documents sought to be filed are set forth; the dates of confiscation of papers and forcible prevention of transmission are specified; the names of the prison wardens involved are given. These facts are shown not only by petitioner's

own affidavits but are corroborated by the affidavits of at least four other people. All of this evidence was proffered by petitioner who also repeatedly requested that he be allowed to bring his witnesses into court. Under Kansas law all of the proof offered could have been considered by the court. *Lee* v. *Prather*, 146 Kan. 513, 71 P. (2d) 868 (1937). There was no denial by respondent of the specific facts alleged, and complete absence of any controverting evidence. Petitioner's allegations and offers of proof were corroborated by the court's own recital that during the very period concerned, the rules and practices at this State prison precluded any prisoner from sending out any habeas corpus papers. That petitioner was singled out for rigorous treatment is likewise demonstrated by this record. Lastly, the circumstances surrounding the filing of his petition in this Court and his efforts to obtain relief in the Federal District Court for Kansas tend to confirm the truth of his charges.

The apparent basis for the court's rejection of this evidence is next examined. We analyze its view that none of the proffered proof was worthy of belief or even examination simply because petitioner, who is not a lawyer, had failed to include it in an earlier application for habeas corpus. Petitioner's present grounds for relief were not mentioned in his earlier application, and Kansas law does not preclude a further application in such circumstances. *In re Clyne*, 52 Kan. 441, 35 Pac. 23 (1893). Thus the omission in the earlier application of the charged suppression of appeal goes only to the credibility of petitioner and his proffered witnesses. We contend that petitioner's explanation that ignorance of his constitutional rights underlay his failure to urge this ground in the earlier application is complete and conclusive. The cumulative force of the affidavits submitted and offers of proof made, in reply to which there was not even a scintilla of contradictory evidence, was

not dissipated; and failure to accord even *prima facie* credibility to them was tantamount to a refusal to consider the issue. On this showing we contend that the determination of the court below on this controlling question of fact was without substantial basis and palpably erroneous.

On the facts adduced we urge that forcibly preventing petitioner from appealing constituted a violation of the equal protection clause of the Fourteenth Amendment. It is not argued that a State must afford an appeal in criminal cases, but only that when it does so it cannot discriminate in the fashion here disclosed. In the present case arbitrary action and systematic discrimination are clear. Since the acts of the prison wardens and State officials must be deemed the act of the State, a constitutional denial of equal protection is demonstrated.

The effect of such violation of constitutional right is to render the commitment void. If the discriminatory acts, which prevent a prisoner from appealing, cease within the time that the statutory appeal can be taken, adequate relief can be provided by permitting it to be filed. But where the unconstitutional discrimination continues beyond the time permitted for appeal, the prisoner must be discharged. This rule derives from the decisions of this Court in analogous cases. Its practical operation in those instances in which State officials act in the arbitrary and discriminatory fashion here shown will in no way interfere with the effective enforcement of the criminal law of a State.

II.

On the denial of compulsory process, we contend that the court made no determination on this question and that if its opinion is to be construed to mean that it did, the decision was without any substantial basis because peti-

tioner's specific allegations and offers of proof were not even controverted. On the basis of historical evaluation of the right to compulsory process, a consideration of what its denial means under present day conditions, and the controlling decisions of this Court as to what constitute the elements of a "fair trial", we argue that to deny to a defendant in a felony case the right to compulsory process is a deprivation of the due process of law guaranteed by the Fourteenth Amendment.

III.

The specific allegations of the refusal to permit defendant to testify in his own behalf after he had asked to do so, were not even considered by the court below. The history of the disqualification of defendants from testifying in their own behalf and the contradictory positions taken by the several States following the statutory removal of such disqualification, combine to show that the failure of a defendant to testify is deemed highly significant. Hence his ability to speak in his own behalf when he desires to do so is realistically one of the most important elements in demonstrating his innocence, and the *refusal* to permit him to speak, under present conditions, destroys the keystone of his trial. Such refusal is closely analogous to freedom of speech, if not a part of it. The failure of the lower court to consider this asserted denial of due process under the Fourteenth Amendment was clearly erroneous.

ARGUMENT.

I.

The Acts of State Officials in Preventing Petitioner From Appealing His Conviction Constitute Violations of the Fourteenth Amendment.

A. *The Conclusion of the Court Below That Petitioner Did Not Attempt to Appeal Is Without Substantial Basis and Palpably Erroneous.*

The first Federal question presented is grounded on the discriminatory action of the Warden and other authorized State officials in preventing petitioner from pursuing the right of appeal from the original sentence afforded to him by the statute law of Kansas. KAN. GEN. STAT. (Corrick, 1935) Secs. 62-1701-04; 62-1919; 60-3306-07. At the threshhold we are faced with the conclusion of the court below, set forth in its opinion, that "There is nothing in the record to indicate that the petitioner attempted to appeal his case to the supreme court" (R. 62). This conclusion is not only without substantial basis in the record; it is also palpably erroneous.

There can be no doubt that the court below considered this question of fact on which the assertion of constitutional denial is based. Under the law of Kansas the existence of facts, beyond the journal entries, which might render a judgment void, is open to inquiry in habeas corpus proceedings. The Kansas statute on habeas corpus permits the plaintiff to controvert the return or to allege new matter in avoidance and provides that the court "shall thereupon proceed in a summary manner to hear and determine the cause * * *." KAN. GEN. STAT. (Corrick, 1935) Secs. 60-2210-11, quoted in Appendix A, *infra*, pp. 59-60. These provisions would be without meaning if the face of the return were conclusive and the court were confined to

examination of the journal entries. The point seems settled in Kansas. See *In re Norton*, 64 Kan. 842, 68 Pac. 639 (1902); *In re Jarvis*, 66 Kan. 329, 71 Pac. 576 (1903), *In re Terrill*, 58 Kan. 815, 49 Pac. 158 (1897) (opinion in unofficial report); *cf. Levell* v. *Simpson*, 142 Kan. 892, 52 P. (2d) 372 (1935), app. dis. 297 U. S. 695 (1936); *In re Bundy*, 144 Kan. 64, 58 P. (2d) 80 (1936); *Lee* v. *Prather*, 146 Kan. 513, 71 P. (2d) 868 (1937). An analysis of the court's opinion, *supra*, pp. 8-10, indicates that it rejected petitioner's proofs offered in support of his charge that he was denied the guarantees afforded by the Fourteenth Amendment. Apparently the court based its determination almost entirely on the fact that in his habeas corpus application, filed five years earlier, petitioner had not raised the point and concluded from this that his allegations and the proffered proofs attached to the application could not be accepted and need not be examined. We do not understand that respondent takes any other view. See *Respondent's Motion to Dismiss*, pp. 11-13.

It is well settled that where violation of a constitutional right is asserted, this Court will of its own responsibility appraise the evidence.[10] In the present case an examination of the record abundantly demonstrates that the court below reached its conclusion by virtually disregarding petitioner's specific allegations and supporting affidavits and offers of proof, and did so in the absence of any denial in respondent's return or even a scintilla of controverting evidence. Its conclusion seems extraordinary in the face of its own finding that during the appeal period the prison rules had precluded the filing of habeas corpus (R. 62).

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[10] *Norris* v. *Alabama*, 294 U. S. 587, 590 (1935); *Pierre* v. *Louisiana*, 306 U. S. 354, 358 (1939); *Chambers* v. *Florida*, 309 U. S. 227, 229 (1940); *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). See Nutting, *The Supreme Court, the Fourteenth Amendment and State Criminal Cases* (1936) 3 U. of Chi. L. Rev. 244, 257-58.

That the court's determination on this basic question of fact was palpably erroneous can be readily demonstrated by examining what petitioner specifically showed in his application, by scrutinizing the surrounding circumstances which the lower court itself recited, and by considering the failure of respondent to meet this issue directly or to furnish even a scintilla of controverting evidence.

In the first place, even the briefest examination of the application reveals the specificity of its allegations. The *documents* which petitioner prepared and unsuccessfully attempted to file *are particularized:* A motion directed to the trial court based on the discovery of new evidence showing his innocence and the accompanying affidavit were confiscated (R. 10, *cf.* Petition, p. 14). A request to secure the transcript of the trial in the committing court was denied by authorized officials (R. 10).[11] Appeal documents and appeal papers were repeatedly confiscated and destroyed (R. 3, 17, 18). *Dates are set forth*: June 3, 1933; June 10, 1933; June 14, 1933 (R. 17-18).[12] *Names are named:* Warden Lacey M. Simpson and Deputy Warden E. M. Stubblefield are alleged to have refused to mail petitioner's appeal (R. 3). Deputy Warden A. J. Graham is in one affidavit specifically charged with particular acts of con-

[11] It should also be noted that throughout the present proceeding petitioner has vainly endeavored to get this same transcript before the court. In his original application he included a "motion" that the Kansas Supreme Court have it sent from the committing court (R. 16). And throughout the proceeding he has complained that this record could not be obtained (R. 58).

[12] The fact that one of the affidavits appended to petitioner's application refers to the date of May 15, 1933, roughly two weeks before petitioner arrived at the penitentiary, supports rather than weakens the force of these detailed allegations. This may well be a typographical error. But even if it is not, it fails to support the suggestion in respondent's brief in the court below (R. 55) that the facts are fabricated. For if the case had been constructed, these minor inconsistencies, normal in testimony of witnesses as to events years removed, would not have appeared in these affidavits.

fiscation (R. 18). Another affiant, a prison welfare worker, confirms the particular acts of Deputy Warden E. M. Stubblefield (R. 27, 67). Others refer to seizure of documents by "Kansas prison officials" (R. 67, 68).[13]

In the face of this particularity of allegation and accompanying affidavits as to when and how and by whom petitioner was forcibly prevented from carrying out his efforts to appeal his sentence, neither the return of respondent nor his Abstract or Brief directly met the issue. None of the alleged acts of prison officials were denied. No affidavits, or even statements, from the prison authorities named in the application were proffered. Nothing was said in the return or in any of the exhibits to it. Instead petitioner's charges were merely termed in respondent's brief in the court below as "ambiguous and unsubstantiated" (R. 55). In place of supported denial by respondent, there was offered only the argument that petitioner had failed to urge this ground upon a former application for habeas corpus.[14]

Moreover, the circumstantial facts recited by the lower court itself thoroughly substantiates petitioner's showing.

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[13] Although these last three affidavits (R. 67, 68) were not attached to the application, they were part of petitioner's Motion to Subpoena Witnesses and should be regarded as part of the record since they were presumably considered by the lower court in the denial of this motion and of petitioner's motion for rehearing (R. 72). *Lee* v. *Prather*, 146 Kan. 513, 516, 71 P. (2d) 868, 870 (1937); cf. *Forest* v. *Holiday*, 313 U. S. 342, 350 (1941); *Gall* v. *Brady*, 39 F. Supp. 504, 506 (D. Md. 1941); *Mathews* v. *Swatts*, 16 Ga. App. 208, 210, 84 S. E. 980, 981 (1915). It should also be noted that the affidavits attached to the application were in the form of verified copies of the originals. Respondent did not in any way question the authenticity of these supporting affidavits.

[14] Indeed, respondent went to the extent of urging that petitioner presses his claim "some years later" and "has offered no proof or supporting evidence that this charge is true" (R. 54). It seems reasonably clear that as early as 1936 petitioner was urging that he had been prevented from appealing his original conviction since the State Parole Attorney referred to this issue in a letter in that year. See Appendix B, *infra*, pp. 61-65.

The court grants that during the entire period in which the time for appeal was running,[15] the prison officials refused to permit inmates of the jail to file petitions for habeas corpus,—a practice condemned by this Court in *Ex parte Hull*, 312 U. S. 546 (1941). It is difficult to believe that they would not have practiced the same ruthless disregard of an inmate's statutory rights and thwarted his attempt to send out appeal documents.[16] Indeed, the probability that petitioner was subjected to particularly rigorous treatment was greatly increased by the letter forwarded in May, 1933, at the time of his commitment, from the County Attorney to the Warden stating:

> "I would suggest that you keep this party under close supervision at all times, otherwise he will cause you trouble" (R. 48).

Finally, in weighing this uncontradicted showing, the court might well attach weight to petitioner's charges, *dehors* the record but sufficiently supported by Federal court records and the Clerk's files in this Court, that officials of the State of Kansas are still interfering with his access to the courts. There is considerable ground for believing that his petition for certiorari to this Court was held by

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[15] Judgment was entered and sentence imposed on May 29, 1933 (R. 46). At that time a defendant in a criminal case had two years after judgment within which to take an appeal. KAN. GEN. STAT. (Corrick, 1935), Sec. 62-1704. Although the court below remarks that the restrictive penitentiary rules preventing documents from being sent out "did not prevail long", it suggests that these remained effective until October 1935 (R. 62). Thus throughout the entire period within which an appeal might have been taken, it is virtually admitted on this record that petitioner could not have sent documents out of the prison.

[16] If the letter which petitioner asserts was removed from his application is authentic, it is almost conclusive on the question. This letter shows that on documents prepared by prisoners at the time the practice was to send them to the Parole Attorney who could, and in this instance did, refuse to approve their being sent out of the penitentiary. (Pet. p. 32, *infra*, Appendix B, p. 64.)

prison or other State officials for almost a month and that certain of his letters to this Court complaining of this action were likewise retained. See Appendix B, *infra*, pp. 61-62. Likewise, there is great difficulty in understanding how the State could on June 18, 1941 move to dismiss an application for habeas corpus to the United States District Court in Kansas on the ground that petitioner had applied to this Court for certiorari when petitioner had not even put his petition in the prison mails until July 16th and the petition did not reach this Court until August 13, 1941. See Appendix B, *infra*, pp. 62-63.

Accordingly, we submit that the conclusion of the court below, that petitioner never attempted to appeal, flies in the face of the record and is palpably erroneous. Its opinion statement that all of his "allegations are made in the most general terms, void of any specifically alleged, controvertible facts" (R. 61) alone demonstrates a virtual failure to entertain the application. And this resolution of facts controlling the constitutional validity of petitioner's detention is even more striking in view of his continued and insistent offer to produce his witnesses in court (R. 20, 21, 66). *Neal* v. *Delaware*, 103 U. S. 370, 395-97 (1880); *Carter* v. *Texas*, 177 U. S. 442, 448 (1900).

There remains the question whether because petitioner some five years earlied had succeeded in breaking the blockade against him [17] and had filed an application for habaes corpus, in which he failed to urge the questions now presented, his evidence must be rejected. It is submitted that the fact of this earlier petition for habeas corpus is immaterial.[18] The opinion of the Kansas Supreme Court on the

[17] In his affidavit accompanying the application petitioner states that he succeeded in having the 1936 petition filed by his sister after he had forwarded the papers to her by an "underground method" (R. 14).

[18] We do not understand the decision of the court below to be that failure to raise all possible issues in one application for habeas corpus precludes further application to the Kansas courts. Unless specifically provided by

earlier application for habeas corpus nowhere suggests that the issues here presented were raised. See *Cochran* v. *Simpson*, 143 Kan. 273, 53 P. (2d) 502 (1936). Yet because of this earlier application both respondent (R. 54) and the court below (R. 62) apparently concluded that petitioner's evidence should be rejected.

If this was the basis for decision, it was manifestly erroneous. Petitioner is not a lawyer, as is clearly shown by the papers appearing in this record. The record also shows that he believes his commitment improper for many reasons. A life sentence for the passing, in the course of his dry cleaning business, of an alleged forged check for $12.60, would lead only naturally to an attack first upon the obvious severity of the punishment. Thus petitioner's first habeas corpus application was directed merely to the invocation against him of the Kansas habitual offender statute which he claimed was inapplicable. More than that, his affidavit in the present case makes it perfectly clear that he did not at the time of this first application—which he had to have smuggled out of the prison—know that the prison officials had acted unlawfully in confiscating his appeal papers in 1933 and 1934. He states that the earlier petition for habeas corpus

> "was never mailed through the prison Authorities and regular mail channels *and being a layman the petitioner never realized that the officials* had no Authority to deny a lawful appeal." (R. 14.) (Italics supplied.)

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statute, and except in certain cases relating to custody of children, the doctrine of *res adjudicata* does not apply to successive applications for habeas corpus. See *Ex parte Royall*, 117 U. S. 241, 254 (1886); *Salinger* v. *Loisel*, 265 U. S. 224, 230 (1924); *People* v. *Shurtleff*, 355 Ill. 210, 189 N. E. 291 (1933); *cf. Kessler* v. *Strecker*, 307 U. S. 22, 25 (1939). The Kansas statute does not specifically preclude successive applications for habeas corpus. Moreover, since in the case at bar the Kansas Supreme Court considered petitioner's application, Kansas must be deemed not to have departed from the earlier State rule. See *In re Clyne*, 52 Kan. 441, 35 Pac. 23 (1893).

The situation thus presented is wholly different from that considered by this Court in *Salinger* v. *Loisel*, 265 U. S. 224 (1924), and *Wong Doo* v. *United States*, 265 U. S. 239 (1924) upon which respondent relies. *Respondent's Motion To Dismiss*, pp. 9-12. In those cases the applicant had advanced the *same* grounds in his first application. In the *Salinger* case, the three petitions alleged the same substantive reasons against extradition. In the *Wong Doo* case, the first petition had raised the same ground set forth in the second but petitioner had offered no proof.[19] Here petitioner alleges facts, not formerly urged, going to the constitutional validity of his commitment. His reasons for the former omission are clear, substantial, and related to the very causes underlying the invalidity of his detention.

The situation presented in the case at bar is no different from that adverted to by this Court in *Johnson* v. *Zerbst*, 304 U. S. 458, 463, 465 (1938), and *Smith* v. *O'Grady*, 312 U. S. 329, 333-34 (1941). Since 1936 petitioner has repeatedly renewed his efforts in both State and Federal courts to review the validity of his commitment (R. 13, 29), despite alleged attempts to hamper these efforts which the circumstances surrounding his petition for certiorari in this Court hardly negative. See Appendix B, *infra* pp. 61-62.

Accordingly it is submitted that the determination of the court below that petitioner in fact never attempted to appeal is without substantial basis and palpably erroneous.

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[19] This Court pointed out that "No reason for not presenting the proof at the outset is offered," 265 U. S. at 241, thus intimating that even a second application urging the *same* grounds would be considered if reason were shown. Here the grounds urged were not even mentioned in the earlier application, and good reason for this failure is shown.

B. *Forcibly Preventing Petitioner From Pursuing His Appeal Was a Denial of Equal Protection of the Laws.*

We come then to a consideration of whether on the showing made by petitioner his detention is in violation of the constitutional right to equal protection of the laws guaranteed by the Fourteenth Amendment. We do not argue that a State must provide an appeal in criminal cases.[20] Our position is much narrower: If a State grants defendants convicted of felony an appeal to its Supreme Court "as a matter of right" [KAN. GEN. STAT. (Corrick, 1935) Sec. 62-1701], the equal protection clause of the Fourteenth Amendment precludes it from forcibly preventing one individual from exercising that right.[21]

Although this precise question has never, to our knowledge, been passed upon by this Court, neither elaborate argument nor cumulative marshaling of decisions is necessary for its resolution. No matter how narrow a historical reading is given the context, "equal protection of the laws" must mean that in both legislative provision and administration the statutory scheme for determining and meting out penal punishment must operate equally under like circumstances.[22] As early stated by this Court in

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[20] Due process does not so require. *McKane* v. *Durston*, 153 U. S. 684, 687; *Andrews* v. *Swartz*, 156 U. S. 272, 275; *Murphy* v. *Massachusetts*, 177 U. S. 155, 158; *cf. District of Columbia* v. *Clawans*, 300 U. S. 617, 627.

[21] It is well settled that the guarantees of the Fourteenth Amendment embrace acts of State executive officers. *Ex parte Virginia*, 100 U. S. 339, 347 (1879); *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926); *Mooney* v. *Holohan*, 294 U. S. 103, 112-13 (1935); *Brown* v. *Mississippi*, 297 U. S. 278, 287 (1936) (jailer one of the state officials involved); *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941). In addition, since the statutory grant makes the appeal an integral part of the legal process in the State, the discriminatory denial of it to a single defendant has been termed by some courts a violation of the due process clause. See *infra*, 29.

[22] *Moore* v. *Missouri*, 159 U. S. 673, 677-78 (1895); *Ughbanks* v. *Armstrong*, 208 U. S. 481, 487 (1908); *Graham* v. *West Virginia*, 224 U. S. 616, 630-31 (1912); *Whitney* v. *California*, 274 U. S. 357, 369 (1927).

Barbier v. *Connolly*, 113 U. S. 27, 31 (1885), the constitutional requirement is

> "that all persons * * * should have like access to the courts of the country for the protection of their persons * * *"

Discrimination in affording an opportunity to a particular defendant to appeal to a higher court for the correction of serious errors in the trial court, does not meet this requirement.

Discrimination in fact must be shown.[23] But this does not mean one who proves that he was in fact deprived of his statutory rights must demonstrate that others were at the same time given what the State statute says they were to have. Absent any proof to the contrary, the customary presumptions that the laws of the State are properly administered will prevail.[24] In any event, the fact that in the years 1933 to 1935, the statutory right to appeal from a conviction for felony was not generally foreclosed in the State of Kansas, can be judicially noticed.[25] *Cf. Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). It is true that there may be basis in the present record (R. 62) for the belief that prisoners in the State penitentiary as a group were barred from prosecuting appeals if they were unlucky enough to be without friends or counsel to do so for them. But there can be no serious contention

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[23] *Carter* v. *Texas*, 177 U. S. 442, 447-48 (1900); *Tarrance* v. *Florida*, 188 U. S. 519, 520 (1903); *Howard* v. *Kentucky*, 200 U. S. 164, 176 (1906); *Hysler* v. *Florida*, No. 64, October Term, 1941, p. 8.

[24] *Bush* v. *Kentucky*, 107 U. S. 110 (1882); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 190 (1932); *Cf. United States* v. *Chemical Foundation*, 272 U. S. 1 (1926). That petitioner was particularly singled out for restrictive treatment cannot be denied on the present record. See *supra*, pp. 7, 20.

[25] From the beginning of the July Term, 1933, to the end of the July Term, 1935, the Kansas Supreme Court delivered opinions in fifty-three criminal appeals. See 138-42, Kansas Reports, *passim*.

that discrimination is absent where the availability of statutory rights of appeal is made dependent upon the prisoner's ability to furnish bail or his possession of relatives or friends outside the jail walls. See *Boykin* v. *Huff*, 121 F. (2d) 865, 870 (App. D. C. 1941).

It likewise seems unnecessary to seek to fit the discrimination here alleged precisely into any of the categories recognized in the cases. Whether their discriminatory acts be deemed "invidious", *Soon Hing* v. *Crowley*, 113 U. S. 703, 708 (1885), or "unjust and illegal", *Yick Wo* v. *Hopkins*, 118 U. S. 356, 374 (1886), or "intentional and arbitrary", *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 352 (1918), the confiscation of petitioner's appeal documents by the State officials deprived him of substantial rights.[26] While it is clear that the errors alleged by petitioner were sufficient to have required reversal of the original conviction—two of them involving the constitutional validity of the commitment, *infra*, pp. 36-53, we submit that whether the appeal would have been successful is immaterial. Petitioner was by state statute afforded an appeal as "of right". *Cf. Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337, 348-50 (1938); *Mitchell* v. *United States*, 313 U. S. 80, 94 (1941). Its merits were to be considered by an appellate court, not by the prison or pardon officials. *Ex parte Hull*, 312 U. S. 546, 549 (1941). Forcibly

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[26] Indeed, the alleged acts of Wardens Graham, Stubblefield, and the State Parole Attorney were not only deliberate and intentional, but they were even "systematic" within the requirements suggested in the tax cases. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 352 (1918); *Chicago G. W. Ry.* v. *Kendall*, 266 U. S. 94, 98 (1924); *Cumberland Coal Co.* v. *Board*, 284 U. S. 23, 28 (1931); *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 245 (1931). The confiscations and refusals to forward court documents were continuous (R. 10, 17-18, 67) and prison officials warned outsiders not to take out papers belonging to petitioner (R. 17). These acts probably were also in violation of the Federal Civil Rights Act. Rev. Stat. Secs. 1977, 1980, 8 U. S. C. A. §§ 41, 47 (3).

preventing him from exhausting it, irrespective of its merits, was a denial to him of the equal protection of the laws. *Cf.* Note (1942) 42 COL. L. REV. 271, 277.

While this point has not been before this Court, it has been judicially considered. In *Bogkin* v. *Huff*, 121 F. (2d) 865 (1941), the Court of Appeals for the District of Columbia clearly enunciated the constitutional rule applicable. Here the defendant, after a trial in which he had been represented by counsel appointed by the court, wrote to the trial judge that he wanted to appeal and asked that counsel be appointed for this purpose. The trial judge concluded, after a conference with the Assistant District Attorney and counsel who had represented the defendant at the trial, that "the possibility of obtaining a reversal in your case is remote" (121 F. (2d) at 869); he refused to assign counsel to take an appeal and suggested to the defendant that "it will be necessary for you to employ private counsel." Believing from this correspondence that no appeal could be had without counsel, the defendant failed to appeal *pro se* within the specified time. Later he applied for habeas corpus on the ground that he had been unconstitutionally discriminated against by the practical denial of his right to appeal. The Court of Appeals determined that the petitioner's original letter sufficed as a filing of the appeal and ordered the record of the trial to be brought before it for consideration on appeal.

In doing so the court found it unnecessary to decide whether if appeal was foreclosed and no other remedy available, the petitioner was entitled to be discharged. It stated that this claim

> "would be entitled to serious consideration if the consequences of the court's mistake could be remedied in no other way. While due process under the Fifth Amendment, as under the Fourteenth, does not require appellate review, nevertheless when Congress

creates that right it is not free from all constitutional restrictions, including the obligation not to make unreasonable discriminations.

The assumption has been widespread that Congress has absolute power to grant or withhold appeals in forma pauperis. No doubt there is wide latitude for determining how far the Government may be required to bear the costs of civil litigation. It may be assumed also that there is room for some discretion concerning the costs of defense in criminal matters. But when the life or the liberty of the citizen is at stake on a serious criminal charge, and appeals are given as a matter of right to those who are able to pay for them, it may be doubted (though as to this we express no opinion) whether they can be withheld from indigent persons solely on the ground of their poverty or otherwise than so as to give them substantially equal protection with more fortunate citizens. The right of appeal, though statutory, is not insubstantial, and its statutory origin does not make it a matter of such small consequence that it may be given or withheld arbitrarily." [121 F. (2d) 872.] [27]

In *State* v. *Guerringer*, 265 Mo. 408, 178 S. W. 65 (1915), the return of the verdict on the last day of the term left the defendant with only fifteen minutes to file the motion for a new trial during the term. The defendant waited until the following term to make his motion. The trial judge overruled it and defendant saved exceptions. Under a statute then in force a motion for a new trial had to be filed during the term or it could not be considered on appeal. If the motion and defendant's exceptions to its denial were out of the case, the defendant would have been deprived of an appellate review of his conviction. The Missouri Supreme Court reversed and remanded for a new trial be-

[27] It should be noted the question whether the appeal was meritorious did not enter into the question whether a discriminatory denial of the right of appeal would result in a violation of the Fifth Amendment.

cause the defendant, under the circumstances, had been deprived of his right to appeal. The opinion clearly recognized that the circumstances had caused a discriminatory denial of the right to appeal and that this violated a constitutionally guaranteed right.

> "If he had no opportunity to file a motion for a new trial, as we must concede he did not have, but notwithstanding this his life be taken, it will have been taken without due process of law. For while the right of appeal is not essential to due process of law (Reetz *v.* Michigan, 188 U. S. l. c. 508), yet if an appeal be allowed to some persons and not to all persons similarly situated, such deprivation of the right to an appeal is equivalent to the denial of due process of law, for due process of law and the equal protection of the laws are secured only when 'the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government' [Duncan *v.* Missouri, 152 U. S. l. c. 382]." 262 Mo. at 416-17, 178 S. W. at 67.

We submit, therefore, that where the State thus discriminatorily deprives a defendant of a statutory right of appeal there is a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

In addition, a number of State and Federal Courts have considered the arbitrary deprivation of a right to appeal otherwise afforded, under the due process clause of the Fifth Amendment and of State constitutions. These courts have invariably termed such interference or denial of the right a denial of due process. See *Boykin* v. *Huff*, 121 F. (2d) 865 (1941); *Jones* v. *Commonwealth*, 269 Ky. 779, 785, 108 S. W. (2d) 816, 819 (1937); *Life & Casualty Ins. Co.* v. *Womack*, 228 Ala. 70, 71, 151 So. 880, 881 (1933); *State* v. *Guerringer*, 265 Mo. 408, 416-17, 178 S. W. 65, 67 (1915).

But whether they approached the problem in terms of due process of law or denial of equal protection of the law,

all courts which have considered the question have readily and necessarily concluded that forcible denial of an appeal which by statute is accorded "as a matter of right" is a denial of constitutional right.

C. *The Denial of Equal Protection Through Suppression of Petitioner's Appeal Beyond the Time Within Which Appeal Could Be Had, Rendered the Commitment Constitutionally Void.*

We have shown that the discriminatory and arbitrary suppression of the petitioner's appeal was a violation of the equal protection clause of the Fourteenth Amendment. This poses the problem as to what effect such denial of constitutional right has upon the validity of his detention. Where violation of a constitutional guarantee occurs during the course of trial and is claimed on appeal, remand for a new trial affords adequate protection. *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Norris* v. *Alabama*, 294 U. S. 587 (1935). But where the time for appeal has expired, and the constitutional defect is disclosed in subsequent habeas corpus proceedings, the commitment is deemed void and the prisoner ordered released. *Cf. Smith* v. *O'Grady*, 312 U. S. 329 (1941); *Johnson* v. *Zerbst*, 304 U. S. 458 (1939). In such cases the State may elect to retry the petitioner and since the original trial was constitutionally void there is no double jeopardy.

In the present case it may be urged that the Constitutional defect being in the denial of appeal, it can be remedied by affording to petitioner at this time the appeal to which he was entitled. *Cf. Lee* v. *Prather*, 146 Kan. 513, 516, 71 P. (2d) 868, 870 (1937); *Boykin* v. *Huff*, *supra*. Thus it might be argued that the State court need merely order the transcript of the trial court before it or permit a bill of

exceptions to be filed and review those errors of State and Federal constitutional law [28] which petitioner charges were made.

We submit that this does not suffice and that the result of this deprivation of constitutional right was to render void the commitment under which respondent detains the petitioner. Irrespective of whether the asserted errors of State law in his original trial would have sufficed to cause reversal, petitioner was constitutionally entitled not to be prevented from having them reviewed within the period allowed for appeal. That right cannot be restored to him, and he has been unlawfully imprisoned through seven years of its denial. Compare this Court's rejection of the argument that a tax constitutionally void because of systematic discrimination might be validated by subsequent equalization. *Iowa-Des Moines Nat. Bank* v. *Bennett*, 284 U. S. 239, 247 (1931).

Nor will having this result flow from this type of invasion of constitutional right in any way interfere with the effective administration of the criminal laws. If unconstitutional denial of an appeal by discriminatory and arbitrary acts of State officials continued beyond the time for appeal renders a commitment void, the duration of the denial beyond the controlling date will automatically safeguard the interests of both State and accused. If only a short period elapses between the expiration of the time for appeal and habeas corpus, the State is in a relatively better position to prosecute the new trial. If, as here, a very long period elapses, any burden on the State is offset by the

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[28] Insofar as the other asserted Federal constitutional defects in the original trial are concerned, infra, Points II and III, the denial of the appeal was an aggravating circumstance. These questions could of course have been raised in the original appeal. They are also clearly presented in the present case as independent grounds.

length of the unlawful detention.[29] Moreover, the entire matter is in the hands of State prison officials whose rules and acts should never preclude those in their custody who are impecunious from having the same access to the courts for purposes of appeal as others subject to the same State laws.

Although the question is new, there is nothing novel in our contention that denial of a constitutional guarantee renders a commitment void. This Court has announced on repeated occasions that no man shall be kept in prison if his confinement was secured without due regard for the fundamental decencies protected by the Fourteenth Amendment. No State may, while the Constitution endures, deprive any person of liberty by a trial which is dominated by a mob,[30] by a conviction secured by confessions improperly obtained from the accused by physical torture or by persistent pressure of the type commonly known as "The Third Degree",[31] or by a judgment based upon a plea of guilty because of the deception of State officers.[32] Nor may it obtain a conviction through the use of testimony known to the prosecuting authorities to be perjured.[33] The State

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[29] *Cf. Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, 369, 11 A. (2d) 656, 662 (1940) where the relator was discharged after nine years' imprisonment. The Pennsylvania court admitted that if there had been a brief imprisonment, relator would have been remanded for a new trial. It stated, "In this case, however, the relator has served nearly nine years' imprisonment, a very substantial part of the sentence imposed upon him. To try him again at this time, after this lapse of years, would probably be most unfair."

[30] *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923); see *Frank* v. *Mangum*, 237 U. S. 309, 335 (1915).

[31] *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936); *Chambers* v. *Florida*, 309 U. S. 227, 235 (1940); *cf. Lisenba* v. *California*, Nos. 4, 5, October Term, 1941, decided December 8, 1941.

[32] *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941).

[33] *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Hysler* v. *Florida*, No. 64, October Term, 1941, decided March 2, 1942, Pamphlet, p. 1.

must afford the accused the aid of counsel, at least in capital cases.[34]

No conviction which falls short of these requirements may stand. A judgment constitutionally defective is open to both direct and collateral attack even though the State court had jurisdiction at the opening of the trial. "That a State court before which a proceeding is competently initiated may—by operation of supreme Federal law—lose jurisdiction to proceed to a judgment unassailable on collateral attack is not a concept unknown to our Federal system." *Kalb* v. *Feuerstein*, 308 U. S. 433, 440, n. 12 (1940). See also *Frank* v. *Mangum*, 237 U. S. 309, 327 (1915); *Moore* v. *Dempsey*, 261 U. S. 86, 92 (1923); *Smith* v. *O'Grady*, 312 U. S. 329, 334 (1941); *cf. Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938).[35]

In the case at bar the operative facts resulting in the denial of the constitutional guarantees of equal protection and due process occurred *after* the trial and caused a loss of the timely review in the appellate court to which petitioner was entitled. We submit that neither the time of the constitutional deprivation nor the fact that it has its impact on the appellate rather than the trial court is of any consequence. We have already noted the opinions of other courts recognizing that denial of a right to appeal afforded others, may be sufficient to render a judgment of conviction constitutionally void. *Boykin* v. *Huff*, *supra*; *State* v. *Guerringer*, *supra*. And the opinions of this Court likewise make

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[34] *Powell* v. *Alabama*, 287 U. S. 45, 65, 71 (1932); *Avery* v. *Alabama*, 308 U. S. 444, 445 (1940).

[35] We shall demonstrate below; *infra*, Points II-III, that the petitioner alleges that he was denied constitutional rights in the course of the trial which, under the rationale of the decisions cited, deprived the trial court of jurisdiction to pronounce a valid judgment, and that these allegations were not directly denied by respondent nor probably considered by the lower court. *Infra*, pp. 36-53. At this point we consider only the effect of the acts of the prison wardens and other officials, *after* the judgment of conviction, which resulted in petitioner being unconstitutionally deprived of his appeal.

it clear that for purposes of inquiry into constitutional validity, there should be no segregation between the trial and appellate portions of judicial action.

In *Frank* v. *Mangum, supra,* an appeal from the refusal of a Federal district court to award a writ of habeas corpus to a petitioner claiming imprisonment by the State of Georgia in violation of the Fourteenth Amendment, the Court recognized that jurisdiction may be "lost in the course of the proceedings" (237 U. S. at 327). But "the course of proceedings" is not restricted to the trial alone. Issues arising under the Fourteenth Amendment must be determined by considering the entire process of commitment. For, accurately speaking, they concern the power and authority of the State itself to detain a prisoner. In the words of the Court:

> "But it would be clearly erroneous to confine the inquiry to the proceedings of the trial court. The laws of the State of Georgia (as will appear from decisions elsewhere cited), provide for an appeal in criminal cases to the Supreme Court of that State upon divers grounds, including such as those upon which it is here asserted that the trial court was lacking in jurisdiction. And while the Fourteenth Amendment does not require that a State shall provide for an appellate review in criminal cases (*McKane* v. *Durston,* 153 U. S. 684, 687; *Andrews* v. *Swartz,* 156 U. S. 272, 275; *Rogers* v. *Peck,* 199 U. S. 425, 435; *Reetz* v. *Michigan,* 188 U. S. 505, 508), it is perfectly obvious that where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the State, and to be considered in determining any question of alleged deprivation of his life or liberty contrary to the Fourteenth Amendment.
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> "*In fact, such questions as are here presented under the due process clause of the Fourteenth Amendment, though sometimes discussed as if involving merely the*

jurisdiction of some court or other tribunal, in a larger and more accurate sense involve the power and authority of the State itself. The prohibition is addressed to the State; if it be violated, it makes no difference in a court of the United States by what agency of the State this is done; so if a violation be threatened by one agency of the State but prevented by another agency of higher authority, there is no violation by the State. It is for the State to determine what courts or other tribunals shall be established for the trial of offenses against its criminal laws, and to define their several jurisdictions and authority as between themselves. And the question whether a State is depriving a prisoner of his liberty without due process of law, where the offense for which he is prosecuted is based upon a law that does no violence to the Federal Constitution, cannot ordinarily be determined, with fairness to the State, until the conclusion of the course of justice in its courts." (237 U. S. at 327, 328). (Italics supplied.)

Thus, we believe it is of no significance whether the infringement of a constitutional right occurs before, during or after the trial court has received the verdict and pronounced sentence. The redress of violation of constitutional rights cannot depend upon the timing of the invasion. The prosecuting attorney, the court, the jailers are all part of the administration of the criminal laws of the State. If the acts of police officers, prosecuting authorities and judges [36] may constitute invasions of constitutional rights which render the judgment of commitment subject to successful attack in habeas corpus proceedings, no reason except formalism exists for refusing to give the same effect to the official action of prison wardens after sentence is pronounced. The proceedings which must be considered

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[36] *Smith* v. *O'Grady*, 312 U. S. 329 (1941); *Mooney* v. *Holohan*, 294 U. S. 103 (1935); *Johnson* v. *Zerbst*, 304 U. S. 458 (1938); *cf. Hysler* v. *Florida*, No. 64, October Term, 1941, decided March 2, 1942.

include those in the appellate tribunal. *Frank* v. *Mangum*, *supra* at 327. See also *Filer* v. *Steele*, 228 Fed. 242 (W. D. Pa. 1915), *aff'd per curiam*, 241 U. S. 648 (1916); *United States* v. *Mills*, 21 F. Supp. 616, 618 (E. D. Pa. 1937); *Ex parte Stonefield*, 36 F. Supp. 453, 455 (W. D. Ky. 1941), *aff'd sub nom. Stonefield* v. *Buchanan*, 124 F. (2d) 23 (C. C. A. 6, 1941). By the same token, the court must scrutinize interferences of State officers which preclude a defendant from pursuing an appeal until the time for doing so has expired. *Cf. Boykin* v. *Huff*, 121 F. (2d) 865 (App. D. C. 1941). And forcible prevention of an appeal, which we have shown to be an unconstitutional discrimination, must relate back [37] to undermine the judgment under which the prisoner is held and to render it invalid. *Cf. Jones* v. *Commonwealth*, 97 F. (2d) 335 (C. C. A. 6, 1938); *Bridwell* v. *Aderhold*, 13 F. Supp. 253, 255-56 (N. D. Ga. 1935); *aff'd*, 92 F. (2d) 748 (C. C. A. 5, 1937), *rev'd on other grounds sub nom. Johnson* v. *Zerbst*, 304 U. S. 458, 468 (1938).

II.

The Alleged Denial of Compulsory Process Was a Violation of the Due Process Clause of the Fourteenth Amendment.

A. *Petitioner's Allegations That He Was Denied the Use of Compulsory Process Were Not Controverted By Respondent.*

The second Federal question presented is based upon the allegations in petitioner's application that he was in effect

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[37] The particular formula employed seems unimportant: An unconstitutional interference with the right to appeal must render the commitment void. This follows either because the constitutional invasion relates back to deprive the committing court of jurisdiction *ab initio*, or because the judgment cannot be regarded as constitutionally final until the time for appeal has passed and any unconstitutional interference with the timely right to appeal prevents it from becoming valid.

denied the use of compulsory process to secure witnesses in his defense. Supplementing the general allegation in his application that he had been denied due process of law (R. 3-4), petitioner in his accompanying verified Statement of Facts alleged that on April 27, 1933, more than two weeks before his trial, he asked that certain witnesses be subpoenaed. These included the truck driver whom he employed and who had accepted the alleged forged check; the cashier who had received it in her daily receipts; and four other witnesses who could testify as to his innocence (R. 7-8). He alleged that the names of these witnesses were excluded from the list of those to be subpoenaed and that they were not present, and further that he had renewed this request at the trial (R. 8). These allegations were repeated in the abstract which petitioner filed as appellant (R. 23-24), and in his brief in the court below (R. 32). None of them was denied in respondent's return (R. 37), or abstract (R. 38-39). Moreover, while the county attorney, in his affidavit accompanying the Return (R. 49-50) specifically denied various allegations concerning the conduct of the trial, he nowhere considers or denies those detailing the refusal to subpoena defendant's witnesses.

Thus there was presented the issue of fact whether petitioner had been denied compulsory process to secure witnesses for his defense and the issue of law as to whether this denial constituted a denial of due process affecting the validity of his commitment. It is not altogether clear how the court below disposed of either of these questions. In summarizing the allegations of the application it made no mention of this specific claim that the use of compulsory process had been denied (R. 60-61). And in its opinion it simply stated:

> "There is nothing in the record of the proceedings in the court below to indicate any irregularity in the petitioner's trial and conviction, and certainly nothing

to indicate that his commitment was void for any reason" (R. 62).

Whether on the question of compulsory process it refused to believe petitioner's uncontroverted and specific allegations or, accepting them, determined that they were legally immaterial, cannot be clearly determined.

If the court below decided the issue of fact against petitioner, its decision cannot stand. Petitioner's allegations are clear and specific. His application sets forth the date of his requests (R. 7-8), the names of the witnesses he asked to have subpoenaed (R. 7-8), and the fact that "these material witnesses were excluded from the list to be subpoenaed and were not present" (R. 8). In the absence of contradiction, a finding (if the opinion below is so to be interpreted) that petitioner was not deprived of his right to compulsory process for witnesses cannot stand.

It has already been noted that, despite petitioner's request, the transcript of the trial court was never produced (R. 16). And though the court below asserted that it entertained "this case only because of plaintiff's allegations respecting the records in the trial court" (R. 62-63), its conclusion that "the records of courts are not set aside upon the unsupported statements of a defeated litigant" must rest on the journal entries which alone were before it. Obviously, the alleged deletion of names of witnesses petitioner needed for his defense would not be revealed in the formal journal entries of the trial (*cf.* R. 44).

If, on the other hand, the court below accepted petitioner's allegations on this point, we contend that the failure to afford him the use of compulsory process to secure witnesses in his defense was a violation of the due process clause of the Fourteenth Amendment.[38] To this we now turn.

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[38] In this same connection we call attention to the fact that the right to compulsory process for witnesses is specifically guaranteed by Section 10

B. *The Due Process Clause of The Fourteenth Amendment Requires That A Defendant In A Felony Prosecution Be Afforded Compulsory Process to Secure Necessary Witnesses.*

It may be taken as settled that the specific recital of a constitutional protection against Federal action in one of the first ten amendments other than the Fifth, does not preclude the same protection from being embraced in the due process clause of the Fourteenth Amendment as against State action. *Powell* v. *Alabama*, 287 U. S. 45, 65-68 (1932); *Palko* v. *Connecticut*, 302 U. S. 319, 324-45 (1937). We, therefore, begin by observing that the Sixth Amendment—the detailed charter of procedural due process in Federal criminal cases—specifically prescribes that

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have compulsory process for obtaining Witnesses in his favor."[39]

We contend that in criminal prosecutions by a State the due process clause of the Fourteenth Amendment embodies the same constitutional requirement.

Pursuing the conventional approach, *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Powell* v. *Alabama*, *supra*, we

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of the Kansas State Constitution, Appendix A, *infra* p. 56, and that this guarantee is fully implemented by statute. KAN. GEN. STAT. (Corrick, 1935) Secs. 62-1309-12, Appendix A, *infra* pp. 56-57. See *State* v. *Roark*, 23 Kan. 147 (1879). Indeed, under the laws of Kansas the prior tender of witness fees is not necessary. See KAN. GEN. STAT. (Corrick, 1935) Sec. 62-1312. *Cf.* 8 WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2191. Once again indulging the presumption that the statutes are otherwise regularly enforced, *supra*, p. 25, petitioner's allegations would also support the contention that he was also denied the equal protection of the laws. We confine ourselves, however, to demonstrating that the facts alleged show a violation of due process.

[39] See, also, 28 U. S. C. A. Secs. 654, 656.

inquire first into the English common law and American colonial practice.

1. *The Right to Compulsory Process Was Regarded As An Essential Requisite Of A Fair Trial In Criminal Cases Prior To The Adoption Of The Federal Constitution.*

In the early English common law, a person charged with treason or felony was denied compulsory process for witnesses even though the use of compulsory process was available to the Crown. See 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 192. An accused charged with felony was not given the right to compulsory process until the beginning of the Eighteenth Century. 1 Anne, c. 9, Sec. 3 (1702).[40] The English common law rule, however, never gained a foothold in the Colonies. See *Holden* v. *Hardy*, 169 U. S. 366, 386 (1898). Of even greater significance is the appearance in early State constitutions of specific guarantees that defendants in criminal cases could require that witnesses necessary to their defense be subpoenaed.[41] Many of these antedated the Federal Bill of Rights by almost a century.

The Constitution of Maryland declared in 1776 "that, in all criminal prosecutions, every man hath a right * * * to have process for his witnesses; * * *" MARYLAND DECLARATION OF RIGHTS, Art. XIX. The Massachusetts Constitution provided that "every subject shall have a right to produce all proofs that may be favorable to him * * *" MASSACHUSETTS CONST., Part the First, Art. XII (1780). The New Hampshire Constitution had a sub-

[40] This statute, providing that all persons appearing as witnesses on behalf of a prisoner upon trial for a felony were allowed to be sworn, was treated by implication as authorizing compulsory process. See 8 WIGMORE, EVIDENCE (3d ed. 1940) Sec. 2190; 1 STARKIE, EVIDENCE (1824) 86.

[41] These early State constitutions are set forth in AMERICAN CHARTERS, CONSTITUTIONS, AND ORGANIC LAWS (Thorpe ed. 1909).

stantially similar provision. NEW HAMPSHIRE CONST., Part 1, Art. XV (1784). In Vermont somewhat different language was used, that in criminal offenses "a man hath a right * * * to be confronted with the witnesses—to call for evidence in his favor * * *". VERMONT CONST., Ch. I, Sec. X (1777). The Virginia Constitution, adopted in 1776, gave to a person accused of crime the right "to call for evidence in his favor". VIRGINIA CONST., Bill of Rights, Sec. 8 (1776). In New Jersey the unfairness of the early English rule was recognized in the provision "That all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to." NEW JERSEY CONST., Sec. XVI (1776).

Similarly, in Pennsylvania, as early as 1701, the Penn Charter (Part the First, Article V) declared that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors." Penn's Charter was also applicable in Delaware.[42]

The historical background of the right to compulsory process parallels the historical basis underlying the right

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[42] Following Penn's Charter, the right of an accused to compulsory process for witnesses was granted by statute and by the Constitution of Pennsylvania. DALLAS, LAWS OF PENNSYLVANIA (1700-1781) 134; CONSTITUTION OF PENNSYLVANIA, Article IX, Sec. 9, (1790). The Rhode Island history is not as clear. For while the first constitution, adopted in 1842, expressly granted the right of compulsory process to accused persons, yet in 1798, "An Act Declaratory of Certain Rights of the People of This State", Sec. 6, pp. 80-81, Revised Public Laws, Rhode Island and Providence Plantations, referred to the right of compulsory process as having been in existence prior to 1798.

As early as 1731, South Carolina, by statute, gave to persons accused of crimes the right of compulsory process. Act of August 20, 1731, GRIMKE, SOUTH CAROLINA PUBLIC LAWS (1682-1790) Sec. XLIV, p. 130.

The original Constitution of Connecticut contained the usual guarantee in respect to compulsory process for witnesses, but this Constitution was not adopted until 1818. CONSTITUTION OF CONNECTICUT, Article I, Sec. 9 (1818). However, a statement from Zephaniah Swift's "A System of the Laws of the State of Connecticut", quoted in *Powell* v. *Alabama*, *supra*, at 63, indicates that the right to compulsory process in Connecticut existed prior to the adoption of the Federal Constitution.

to counsel. See *Powell* v. *Alabama*, *supra*, at 61-64. It is also significant that many of the earlier constitutions and statutes couple in a single provision the right to compulsory process with the right to counsel. See Constitutions of Maryland, Vermont, New Jersey and Pennsylvania; the Penn Charter; DALLAS, LAWS OF PENNSYLVANIA, (1700-81) 134; see also U. S. CONSTITUTION, Sixth Amendment. Indeed, in one respect at least it is more persuasive. For while in England accused persons were given the right of compulsory process for witnesses as early as 1702, the aid of counsel was not given until 1836. *Cf. Powell* v. *Alabama*, *supra*, at 60. And while conceivably a defendant might conduct his own defense without the aid of counsel, unless he can successfully secure witnesses he may be deprived of his evidence. *Cf. Hysler* v. *Florida*, No. 64, October Term, 1941, p. 11.

Moreover, if historical analogies have force, the history underlying the right of compulsory process appears to be much stronger than that supporting the right to freedom of speech, *De Jonge* v. *Oregon*, 299 U. S. 353 (1937). Freedom of speech, as a specific guarantee, was created for the first time in this country by the First Amendment to the Constitution. See Warren, *The New "Liberty" Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431, 461. In *Palko* v. *Connecticut*, *supra*, at 327, Mr. Justice Cardozo, characterized freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom." Since an accused person speaks most effectively through his witnesses, and freedom of speech should not be diminished by addition of the words "in one's own defense", both rights have equal place in the concept of due process.

2. *The Right To Compulsory Process Is A Fundamental Part of Due Process.*

Recognizing that inclusion of a particular protection within the context of due process involves not only acceptance of historical precedent but also recognition of the "social and moral values" of the right asserted, *Palko* v. *Connecticut*, 302 U. S. 319, 326 (1937),[43] we contend further that the necessity for giving to a defendant accused of felony the means of securing witnesses for his defense is part of "that fundamental fairness essential to the very concept of justice." *Lisenba* v. *California*, Nos. 4, 5, October Term, 1941, decided December 8, 1941. Failure to afford compulsory process violates fundamental standards of criminal procedure. See National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement* (1931) Vol. IV, p. 284. That this is so can be shown by examination of what its denial would mean under present-day conditions, by reference to comment by this Court and others, and by the zealous regard which has been given to subpoena rights in other types of cases.

Whatever may have been true in the days of Coke,[44] realistic appraisal of present-day conditions makes it clear that denial of compulsory process would go far to destroy effective presentation of a defense. Apart from a prevalent disinclination to "get mixed up in crime", there are many reasons why subpoena powers must be available to compel the attendance of witnesses in criminal cases. Competitive demands of job and of family; lack of direct in-

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[43] See, *e.g.*, *Hurtado* v. *California*, 110 U. S. 516 (1884); *Maxwell* v. *Dow*, 176 U. S. 581 (1900); *Twining* v. *New Jersey*, 211 U. S. 78 (1908); *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934).

[44] Compare discussion of the common law denial of both counsel and witnesses, in RADIN, ANGLO-AMERICAN LEGAL HISTORY (1936) 229; 2 WIGMORE, EVIDENCE (3d ed. 1940) § 595; 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 192-93.

terest; unfortunate concepts of respectability; and occasional prejudice—combine to prevent voluntary appearance as a witness in a criminal case. More important is the current movement of people within a State with the result that desire to see justice done is thwarted by the inconvenience and expense of attending a trial. Unless appearance can be compelled, it is likely not to be made.

These reasons were reflected in the comments of this Court in *Holden* v. *Hardy*, 169 U. S. 366, 386 (1898), that the early English practice denying compulsory process in criminal cases was "oppressive", and the later recognition in *Kelley* v. *Oregon*, 273 U. S. 589, 591 (1927), that a defendant should not be "in any way prevented from securing needed witnesses."[45] In like fashion, decisions of the State courts have also recognized the fundamental character of the right to compulsory process. Thus, in *Osborne* v. *People*, 83 Colo. 4, 7, 262 Pac. 892, 893 (1928), the court refers to the old English rule denying compulsory process as an injustice. In *Christie* v. *State*, 94 Fla. 469, 114 So. 450 (1927), the court stated that a fair and impartial trial contemplates compulsory attendance of witnesses. In *Williams* v. *State*, 23 Ala. App. 297, 298-99, 124 So. 402, 403 (1929), the right to compulsory process is referred to as "a substantive right, a real right, and not an illusory sham

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[45] *Ex parte Harding*, 120 U. S. 782 (1887) appears to have turned on the procedural limitations then prevailing for habeas corpus in the Federal courts. See, also, Note, *The Federal Bill of Rights and the Fourteenth Amendment* (1938) 26 GEO. L. J. 439, 459: "While there is little authority directly in point, it is believed that the refusal of a state to allow the accused compulsory process for obtaining witnesses in his favor, where such witnesses could be reached by subpoena, would infringe the due process clause of the Fourteenth Amendment. This result would seem to follow from the Court's repeated statements that a 'hearing' is the *sine qua non* of due process in the administration of justice. A hearing without witnesses in one's defense would certainly be a mockery. It is a well-known fact that many witnesses, unless summoned by order of the court, would not appear, and supply testimony essential to the defense."

to be satisfied by the issue of process, which is to be rendered ineffectual by hastening on to immediate trial." *Cf. Graham* v. *State*, 23 Ala. App. 553, 129 So. 295 (1930). In *Mitchell* v. *Commonwealth*, 225 Ky. 83, 7 S. W. (2d) 823 (1928), an opportunity to secure witnesses was termed an essential part of a fair trial. See also *Jackson* v. *Commonwealth*, 215 Ky. 800, 287 S. W. 17 (1926); *State* v. *Roark*, 23 Kan. 147 (1879).

Finally we call to the attention of the court the developing view that in hearings before administrative agencies those whose rights are being determined should be afforded a right to compulsory process for witnesses at least equal to that given to the agency. *Inland Steel Company* v. *National Labor Relations Board*, 109 F. (2d) 9 (C. C. A. 7th, 1940); *National Labor Relations Board* v. *Ed. Friedrich, Inc.*, 116 F. (2d) 888 (C. C. A. 5th, 1941); *Bethlehem Steel Company* v. *National Labor Relations Board*, 120 F. (2d) 641 (App. D. C., 1941). In the *Inland Steel* case an order of the Board was set aside for lack of a fair hearing in that restrictions were placed upon the issuance of subpoenas for the company's witnesses which were not applied to those issued for the Board. The Court of Appeals for the Seventh Circuit relied upon "the unfairness of the procedure employed" and stated that the inquiry to be made was "whether it [the company] was, by such procedure, deprived of a substantial right." 109 F. (2d) at 19-20. Dissenting in the *Bethlehem* case, Judge Stephens said:

> "the right of every citizen in both civil and criminal cases to have compulsory process for the attendance of witnesses is an essential feature of the Anglo-American system. 8 Wigmore, Evidence (3d — ed., 1940) §§ 2190-1. The Sixth Amendment to the Constitution expressly preserves that right in criminal cases * * * There is no more elementary proposition in Anglo-American law than that the Government

> itself in its prosecution in its own tribunals of cases against the citizen shall be on terms of equality with the citizen before the law; and this applies not only to substantive but also to procedural rules." 120 F. (2d) at 660.

See, also, Note, *Subpoenas and Due Process in Administrative Hearings* (1940) 53 HARV. L. REV. 842, 846.

For these reasons we submit that the due process clause of the Fourteenth Amendment embraces the requirement of compulsory process both as a matter of historical precedent and because of its fundamental importance as a necessary part of a fair trial. For reasons already discussed, the denial of due process renders the commitment void. *Smith* v. *O'Grady*, 312 U. S. 329 (1941). See also, *supra*, pp. 30-36.

III.

The Alleged Denial of Petitioner's Right to Testify in His Own Defense Was a Violation of the Due Process Clause of the Fourteenth Amendment.

A. *Petitioner's Allegations That He Was Denied the Right To Take the Witness Stand in His Own Defense Were Not Directly Denied by Respondent or Properly Considered by the Court Below.*

The third Federal question presented is based upon the allegations in petitioner's application that he was prohibited from testifying in his own behalf. Supplementing the general claim in his application that he had been denied due process of law (R. 3-4), petitioner in his accompanying verified Statement of Facts alleged that in his original trial, after the State had put in its case

> "your petitioner ask to take the stand in his own behalf, this was met with rigid opposition and denial. The petitioner was severely reprimanded when he

ask for his rights, a disturbance issued, the court 'old your petitioner to set down, the defense rested its ca. e." (R. 9).

This charge was repeated in the Abstract filed by petitioner in the court below (R. 26). Inasmuch as the only persons involved were petitioner himself and the trial judge, it is submitted that these allegations are sufficiently specific. They indicate the place, the time, and the persons involved in the refusal. Once again we find that the respondent neither in his return nor in his brief in the court below paid any attention to these charges. The accompanying affidavit by the County Attorney, however, specifically stated that the "allegations relative to the misconduct on the part of the Honorable Wendell Ready, Judge of the District Court of Sumner County, Kansas, are untrue" (R. 50). To this respondent replied in his Answer, which may be taken as a traverse, that his allegations were true and could be proved (R. 56-57). And as part of his original application for habeas corpus, petitioner had attached a motion for an order directing the trial court which had committed him to send to the Supreme Court "all records, documents, *transcripts* and entries" (R. 16). If, as we contend, this question of fact as to whether petitioner had been denied the right to take the stand in his own behalf controls the constitutional validity of the commitment, a determination whether petitioner's allegations were well founded could readily have been made by an examination of the transcript of his trial. So far as can be determined the court below gave no consideration to the Federal right thus asserted. Failure to do so was tantamount to denying petitioner a hearing on the question. If the facts alleged are determinative of the constitutional validity of the commitment, this alone warrants remand.

We turn then, to the question whether denying to a defendant in a criminal prosecution for a felony the oppor-

tunity to testify in his own defense, where he asks to do so, constitutes a violation of the constitutional guarantee of due process.

B. *The Right of a Defendant Accused of Felony to Testify In His Own Defense Is Now Guaranteed by the Due Process Clause of the Fourteenth Amendment.*

So far as we know this Court has never determined whether refusing to permit a defendant charged with commission of a felony who asks to testify in his own behalf to do so is in violation of the fundamental right to "an opportunity to defend", *Snyder* v. *Massachusetts*, 291 U. S. 97, 122, and "a fair hearing". *Id.* at 127, 130. While it has been said that the "right to be heard by himself and counsel" is substantially "embodied in the Sixth Amendment", *Diaz* v. *United States*, 223 U. S. 442, 455, the precise question here presented appears not to have been considered.

We submit that the undefined boundaries of procedural due process do not foreclose this protection. The historical background may at first glance appear to negative this contention; but when carefully analyzed it lends support. It is true that the right of a defendant to take the witness stand in his defense did not exist either at common law or in this country prior to adoption of the Federal Constitution. On the contrary up to 1864 in no State was an accused person even deemed competent to testify in his own behalf.[46] But this disqualification was for the *protection* of the accused.

> "That the formal grant of competency, then, was so long withheld was due rather to a hesitation founded

[46] The history of the statutory abolition of the disqualification of an accused person to testify for himself is fully set forth in 2 WIGMORE, EVIDENCE (3d ed. 1940) § 579. In England the disqualification was not fully removed until 1898. 61 & 62 VICT. c. 36.

on the supposed advantage of the accused himself. His failure to use the right of testifying would (it was believed) damage his cause more seriously than if he were able to claim that his silence was enforced by law. But, chiefly, his exercise of the right to testify would (it was believed), in subjecting him to the ordeal of cross-examination, place him in a situation in which even an innocent man would show at a disadvantage, and would injure more than assist his own cause." 2 WIGMORE, EVIDENCE (3d ed. 1940) § 579.

Indeed, it was even suggested that the abolition of the disqualification would so seriously prejudice defendants in criminal cases that such statutory reform was in itself unconstitutional. Maury, *Validity of Statutes Authorizing the Accused to Testify* (1880) 14 AM. L. REV. 753.

Nevertheless, at the present time with a single exception the statutes of every State permit the defendant in a criminal case to testify in his behalf.[47] And in Kansas the statute explicitly provides that "No person shall be rendered incompetent to testify in criminal causes * * * by reason of his being the person on trial. * * *" *Kan. Gen. Stat.* (Corrick, 1935) § 62-1420; see *State* v. *Owen*, 124 Kan. 533, 261 Pac. 600 (1927). With the removal of the disqualification, new problems arose: If an accused was free to testify, could his failure to testify warrant an inference of guilt and be made the subject of comment by court or prosecution? Within the freedom permitted by *Twining* v. *New Jersey*, 211 U. S. 78 (1908), the States have answered this

[47] The statutes are collected in 2 WIGMORE, *supra*, § 488. In Georgia no criminal defendant is "competent or compellable to give evidence for or against himself" but has "the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case" but the defendant cannot be cross-examined. GA. CODE ANN., 1933, §§ 38-416, 38-415. The form of this single surviving disqualifying statute illustrates the theory that making the defendant incompetent was for his own protection.

question either by express statutory prohibition of inference and comment,[48] or by statute or decision permitting such comment. See (1936) 50 HARV. L. REV. 356. While at the present time there are only a few States in which an inference is properly permitted to be drawn against a defendant who prefers to remain silent, the number is gradually being enlarged.[49]

But apart from the question whether permitted comment on the *failure* to testify results in compulsory self-incrimination or whether any attempt to erase the inference by instruction is psychologically futile, *Bruno* v. *United States*, 308 U. S. 287, 293-94, we submit that whether the States have prohibited comment on a defendant's failure to take the stand or have expressly sanctioned it, there is in either case complete recognition that the failure of a defendant to do so is regarded as tremendously significant. Otherwise the efforts to prevent or to utilize the adverse inference would be meaningless. No matter how resolved, the agitation on this question is likewise recognition of the fact that

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[48] The statutes are collected in 8 WIGMORE, *supra*, § 2272. In Kansas a statute going back to 1871 specifies that the failure of an accused to testify "shall not be construed to affect his innocence or guilt," KAN. GEN. STAT. (Corrick, 1935) § 62-1421, but this provision appears to have been eroded by decision. In *State* v. *Owen*, 124 Kan. 533, 261 Pac. 600 (1927) a question by the prosecuting attorney whether the members of the jury would remain content not to testify if they were on trial, was held to be not a reversible error despite the statute. Earlier Kansas decisions had begun the process. *State* v. *Rambo*, 69 Kan. 777, 77 Pac. 563 (1904), set aside a verdict because the jury had drawn an inference from defendant's failure to testify. Later decisions tend to restrict its effect. *State* v. *Dreiling*, 95 Kan. 241, 147 Pac. 1108 (1915). *Cf. State* v. *Balch*, 31 Kan. 465, 2 Pac. 609 (1884) with *State* v. *Peterson*, 102 Kan. 900, 171 Pac. 1153 (1918). For a discussion of the Federal rule, see *Bruno* v. *United States*, 308 U. S. 287 (1939).

[49] See 8 WIGMORE, *supra*, § 2272. Recommendations have been made by the American Law Institute and the American Bar Association that a defendant's failure to testify should be a proper subject of comment by the prosecutor. See 9 PROC. AM. L. INST. (1931) 202-18; (1931) 56 A. B. A. REP. 137-59.

—once the protective disqualification has been removed—the right of a defendant, who wants to do so, to testify in his own behalf is important, if not fundamental, to making an adequate defense. For if the silence of the accused is so significant that Constitutional and statutory provision must be made to suppress or dissipate the inevitable inference,[50] preventing testimony by a defendant who desires to testify, and thus to avoid the inference in direct fashion, destroys virtually the keystone of his defense. It is a commonplace among those familiar with the criminal courts that where the defendant does not take the stand, the probability of an acquittal is exceedingly remote.[51] In these circumstances the right to due process must include the right to speak, when one desires, in his own defense.

We do not urge that as a necessary corollary a defendant must be advised that he can take the stand in his own defense. Where a State permits comment on his refusal to do so, this would not be an unreasonable requirement. But where comment is precluded by constitution or statute, advising the defendant in the presence of the jury would defeat the other protection provided. Nevertheless, a clear distinction must be drawn between a *failure* to testify and a *refusal to permit* a defendant to do so when he so requests.

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[50] In *State* v. *Owen, supra,* the Kansas Court remarked: "Of course, if the jurors were awake, they knew as well as counsel did that defendant had not testified, and even a direct reference to it would not have been any information to them * * *." 124 Kan. at 538, 261 Pac. at 602. And in an old Maine case, *State* v. *Cleaves,* 59 Maine 298, 301 (1871), the Court observed that "The silence of the accused—the omission to explain or contradict * * * is a fact * * * which the jury must perceive, and which perceiving they can no more disregard than one can the light of the sun, when shining with full blaze on the open eye."

[51] In recommending the allowance of comment on a *failure* to testify, the Wickersham Commission concluded that "The inference of guilt from silence is so natural, and inevitable that the attempt to suppress it produces an atmosphere of insincerity." National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement,* (1931) Vol. IV, p. 342.

In view of the inevitable result—whether comment is prohibited or permitted—such refusal destroys the fairness of the trial.

Our argument thus comes down to urging that in this instance the historical facts, though inverted in their application, show first, that a zealous regard for defendants and a recognition of the consequences of a failure to testify, as well as a mistaken apprehension as to the possible effect of their showing on cross-examination, led originally to their protection through complete disqualification; and, second, that with the enlightened removal of this disqualification, the situation has become completely reversed so that the right to testify has become essential.[52] Under present conditions denial to an accused of the right to speak in his own defense deprives him of probably the most valuable element in a fair trial.[52] See *People* v. *Rosenzweig*, 135 Misc. 324, 239 N. Y. Supp. 358 (1929); *People* v. *Rakiec*, 260 App. Div. 452, 457, 23 N. Y. S. (2d) 607, 612 (1940). And such denial is aggravated in effect where as in the case at bar there is also a denial of compulsory process.

Thus we submit that where the State, acting through its courts, denies to a criminal defendant who asks to testify the opportunity to speak in his own behalf, there is a denial of what has come to be a fundamental requirement of a fair trial and hence a right protected by the due process clause of the Fourteenth Amendment.[53] There is no logical difference between the protection of freedom of speech in labor disputes [*Carlson* v. *California*, 310 U. S. 106 (1940);

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[52] Even in Georgia where the disqualification survives, it has been seen that not only is the accused given the right to address the jury, without being subjected to cross-examination, but his statement may be accepted to contradict sworn testimony. *Supra* note 47.

[53] Since the Kansas statutes afford the opportunity to all defendants to testify, and it may be presumed that these enactments are otherwise generally given effect, *supra* p. 25, there is also ground for asserting that denial of petitioner's request to testify was likewise a denial of the equal protection of the laws. See *supra* note 38.

Thornhill v. *Alabama*, 310 U. S. 88 (1940); *American Federation of Labor* v. *Swing*, 312 U. S. 321 (1941)], in challenging organized religions [*Cantwell* v. *Connecticut*, 310 U. S. 296 (1940)], in distributing circulars without a permit [*Schneider* v. *New Jersey*, 308 U. S. 147 (1939)] or in criticizing pending judicial proceedings [*Bridges* v. *California*, 86 L. Ed. 149 (1941)] and ensuring that right where the individual's personal liberty is at stake and his opportunity to speak in his own behalf may control the result.

Consequently, if the facts alleged by petitioner can be proved, the denial of an opportunity to testify in his own behalf was a violation of due process and such denial likewise renders void the commitment upon which he is being held. Inasmuch as the court below failed properly to consider this question, though it was squarely in issue, we respectfully urge that for this reason alone the cause should be remanded.

IV.

The Cause Should Be Reversed and Remanded.

Since the application of the court below disclosed facts which, if true, would render the commitment void because of constitutional defects, it is submitted that the cause should be reversed and remanded.

We have demonstrated that on the specific showing made by petitioner, the determination of the court below that petitioner had in fact never attempted to appeal from his original conviction was palpably erroneous and was tantamount to a refusal to consider the facts. If viewed as merely an offer of proof, petitioner's affidavits should suffice for reversal. *Neal* v. *Delaware*, 103 U. S. 370, 395-97 (1880); *Carter* v. *Texas*, 177 U. S. 442, 448 (1900).

There was, however, no direct contradiction of petitioner's specific allegations. Because of the previous confiscation of his documents, he has not attached to his application the originals of the supporting affidavits upon

which he relies to demonstrate that his attempts to appeal were forcibly prevented by State officials. Consequently, we contend that the cause should be remanded and petitioner be permitted to submit his proofs on this question of fact. If his allegations are proved, we submit that he is entitled to his discharge on the ground that the forcible prevention of his appeal beyond the time within which one could be taken, was a denial of constitutional right which renders the commitment void. *Cf. Smith* v. *O'Grady*, 312 U. S. 329 (1941).

On the question of fact whether he was denied compulsory service of process in that the names of the witnesses he asked to be summoned were stricken from the list, he should be afforded an opportunity to establish this fact in an appropriate judicial hearing since here again the alleged facts show a denial of constitutional right sufficient to render the commitment void.

Similarly, on the question of fact whether he asked to testify in his own behalf and was denied an opportunity to do so, he should be permitted to establish this charge. If available, the transcript in the trial court should be produced. If this transcript is not available, petitioner should be permitted to prove his allegations in some other fashion and the State should meet this proof by something more than mere general denial since here again the facts alleged show a denial of constitutional right sufficient to render the commitment void.

Conclusion.

For the foregoing reasons, we respectfully submit that the cause should be reversed and remanded.

Respectfully submitted,

H. Thomas Austern,
Counsel for Petitioner.

March, 1942.

APPENDIX A.

1. Federal Constitution.

The Fourteenth Amendment provides in part as follows:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Constitution and Statutes of Kansas.

A. *Right of Appeal.*

G. S. 1868, c. 82, sec. 281, Kan. Gen. Stat. (Corrick, 1935) sec. 62-1701:

An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him; and, upon the appeal, any decision of the court, or intermediate order, made in the progress of the case, may be reviewed.

L. 1915, c. 266, sec. 2, Kan. Gen. Stat. (Corrick, 1935) sec. 62-1702:

The provisions of law relating to the manner of taking and perfecting appeals to the supreme court in civil cases, the making and filing of a transcript of the evidence and what shall be deemed a part of the record shall be applicable and extend to criminal cases except as to the time within which an appeal may be taken and as to the requirements that an appellant give security for costs.

G. S. 1868, c. 82, sec. 284, revised 1923, Kan. Gen. Stat. (Corrick, 1935) sec. 62-1704:

The appeal must be taken within two years after the judgment is rendered.

L. 1909, c. 182, sec. 569, Kan. Gen. Stat. (Corrick, 1935) sec. 60-3306:

Appeals to the supreme court shall be taken by notice filed with the clerk of the trial court, stating that the party

filing the same appeals from the judgment, order or decision complained of to the supreme court, * * *. A copy of such notice must be personally served on all adverse parties whose rights are sought to be affected by the appeal, and who appeared and took part in the trial, or their attorneys of record; * * * and thereupon the appeal shall be deemed to be perfected.

L. 1909, c. 182, sec. 570, Kan. Gen. Stat. (Corrick, 1935) sec. 60-3307:

When the appeal is perfected and proof of service of notice of the appeal * * * is filed with the clerk of the trial court, he shall forthwith make a certified copy of such notice and proof of service * * * and transmit the same to the clerk of the supreme court, together with a certified copy of the journal entry of the judgment or order appealed from; and thereupon, on compliance with the rule of the supreme court with reference to security for costs, the appeal shall be docketed by the clerk of the supreme court.

B. *Compulsory Process.*

Constitution of Kansas, Bill of Rights, Sec. 10:

In all prosecutions, the accused shall be allowed * * * to have compulsory process to compel the attendance of witnesses in his behalf * * *.

G. S. 1868, c. 82, sec. 165, Kan. Gen. Stat. (Corrick, 1935) sec. 62-1309:

All courts of record having criminal jurisdiction, shall have power to compel the attendance of witnesses in criminal cases from any county in the state, to testify either on the part of the state or for the defendant.

G. S. 1868, c. 82, sec. 166, Kan. Gen. Stat. (Corrick, 1935) sec. 62-1310:

Subpenas, and other compulsory process to compel the attendance of witnesses in criminal cases, shall be issued

and served in the same manner, and the disobedience thereof punished the same, as in civil cases; and every delinquent witness shall be liable to the party at whose instance he was summoned, in the same manner and to the same extent as in cases of witnesses summoned in a civil action.

G. S. 1868, c. 82, sec. 167, Kan. Gen. Stat. (Corrick, 1935), sec. 62-1311:

A subpena may be directed to the sheriff of the county in which the witness resides, or may be found; and, in such case, the said sheriff shall make immediate service, and speedy return thereof, by mail to the court from which it is issued, with the time and manner of service endorsed thereon, and the distance, by the most direct route of common travel, from his residence to the place of such service.

G. S. 1868, c. 82, sec. 168, Kan. Gen. Stat. (Corrick, 1935), sec. 62-1312:

It shall not be necessary to pay or tender any fees whatever to any witness summoned on the part of the state, or on the part of the defendant; but such witness shall be bound to attend, and be liable for his non-attendance, in the same manner as if the fees allowed to witnesses had been duly paid to him.

L. 1909, c. 182, sec. 322, Kan. Gen. Stat. (Corrick, 1935) sec. 60-2806:

The clerks of the several courts and judges of the probate courts shall on application of any person having a cause or any matter pending in the court, issue a subpoena for witnesses, under the seal of the court, inserting all the names required by the applicant in one subpoena, which may be served by the sheriff, coroner, or any constable of the county, or by the party or any other person. When a subpoena is not served by the sheriff, coroner or constable, proof of service shall be shown by affidavit; but no costs of service of the same shall be allowed except when served by an officer.

C. *Right to Testify.*

L. 1871, c. 118, sec. 1, Kan. Gen. Stat. (Corrick, 1935), sec. 62-1420:

No person shall be rendered incompetent to testify in criminal causes * * * by reason of his being the person on trial * * *.

L. 1871, c. 118, sec. 2, Kan. Gen. Stat. (Corrick, 1935), sec. 62-1421:

If the accused shall not avail himself of his right to testify in any case, it shall not be construed to affect his innocence or guilt.

D. *Writ of Habeas Corpus.*

The Kansas Constitution contains the following provisions relating to the writ of habeas corpus:

Sec. 8. (Kansas Bill of Rights) Habeas corpus. The right to the writ of habeas corpus shall not be suspended, unless the public safety requires it in case of invasion or rebellion.

Article 3, Sec. 3. (Constitution of Kansas). Jurisdiction and terms. The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law. It shall hold one term each year at the seat of the government and such other terms at such places as may be provided by law, and its jurisdiction shall be coextensive with the state.

L. 1909, c. 182, sec. 687, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2201:

Every person restrained of his liberty under any pretense whatever may prosecute a writ of *habeas corpus* to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

L. 1909, c. 182, sec. 689, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2203:

Application for the writ shall be made by petition, signed and verified either by the plaintiff or by some person in his behalf, and shall specify:

First.—By whom the person in whose behalf the writ is applied for is restrained of his liberty and the place where, naming all the parties, if they are known, or describing them if they are not known.

Second.—The cause or pretense of the restraint, according to the best of the knowledge and belief of the applicant.

Third.—If the restraint be alleged to be illegal, in what the illegality consists.

L. 1909, c. 182, sec. 690, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2204:

Writs of *habeas corpus* may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation; and upon application the writ shall be granted without delay.

L. 1909, c. 182, sec. 696, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2210:

The return must be signed and verified by the person making it, who shall state:

First.—The authority or cause of restraint of the party in his custody.

Second.—If the authority be in writing, he shall return a copy and produce the original on the hearing.

Third.—If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer. He shall produce the party on the hearing, unless prevented by sickness or infirmity, which must be shown in the return.

L. 1909, c. 182, Sec. 697, Kan. Gen. Stat. (Corrick, 1935) sec. 60-2211:

* * * The plaintiff may except to the sufficiency of, or controvert the return or any part thereof, or allege any

new matter in avoidance; the new matter shall be verified, except in case of commitment on a criminal charge; the return and pleadings may be amended without causing any delay.

L. 1909, c. 182, sec. 698, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2212:

The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuance thereof, shall discharge the party.

L. 1909, c. 182, sec. 699, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2213:

No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following:

First.—Upon process issued by any court or judge of the United States, or where such court or judge has exclusive jurisdiction.

Second.—Upon any process issued on and final judgment of a court of competent jurisdiction.

Third.—For any contempt of any court, officer or body having authority to commit; but an order of commitment as for a contempt upon proceedings to enforce the remedy of a party is not included in any of the foregoing specifications.

Fourth.—Upon a warrant or commitment issued from the district court or any other court of competent jurisdiction upon an indictment or information.

L. 1909, c. 182, sec. 702, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2216:

The court or judge shall have power to require and compel the attendance of witnesses, and do all other acts necessary to determine the case.

L. 1909, c. 182, sec. 711, Kan. Gen. Stat. (Corrick, 1935), sec. 60-2225:

No deposit or security for costs shall be required of an applicant for a writ of *habeas corpus.*

APPENDIX B.

Supplementary Statement of Facts.

In addition to the record formally certified from the court below, there are other relevant alleged facts to which we advert in our argument. Some of these are stated in the Petition for Certiorari, and others are disclosed in the files in the Clerk's Office in this Court. They concern petitioner's charge that in this very proceeding State officials of Kansas have interfered with petitioner's efforts to obtain habeas corpus in the court below and to secure timely review by certiorari in this Court. The truth of these charges cannot be finally determined on the present record. In view of *Ex parte Hull*, 312 U. S. 546 (1941), we feel constrained to call to the attention of the Court the facts alleged and what is offered in proof of the charges.

Delay on Petition for Certiorari.

One of the essential questions of fact in this case is whether petitioner was prevented from having access to the courts to appeal his original conviction in 1933. *Supra*, pp. 16-23. Of some interest, therefore, is the story of what happened to his petition for certiorari addressed to this Court in 1941 and what happened in his effort to obtain relief from the Federal District Court in Kansas after the Kansas Supreme Court had denied his application in the case at bar.

First, as to the petition for certiorari in the present case. The court below denied petitioner's application on June 7, 1941 (R. 59), and the final order on the rehearing motion was entered on July 3, 1941 (R. 72). On July 26, 1941 petitioner wrote to the Clerk of the United States Supreme Court stating that ten days earlier, on July 16, 1941, he had mailed his application for certiorari in the prison mails. On July 29, 1941 the Clerk of this Court replied that the

application had not been received. On August 1, 1941, petitioner again wrote to the Clerk of this Court and stated that he had learned (how he does not say) that the application for certiorari had not been forwarded to this Court but had been sent instead to the Pardon Attorney, Mr. Donald C. Allen, at Topeka, Kansas, and that Mr. Allen was still holding it almost two weeks after petitioner had placed it in the prison mails addressed to this Court. He asked that the Clerk of this Court require the surrender of these papers. On August 2, 1941, petitioner wrote to Pardon Attorney Allen asking that the papers be forwarded to the Clerk of this Court to whom he forwarded a copy of this letter.

About a week later, on August 8, 1941, petitioner again wrote to the Clerk of this Court stating that the Warden had written him that his petition was still being held by the State officials. Three days later, on August 11, 1941, he wrote again asking that the impounding of his certiorari papers be brought to the attention of the Attorney General and the Chief Justice.

Neither respondent's letter of August 1, 1941, enclosing a copy of his letter to the State Pardon Attorney which asked surrender of his certiorari papers, nor his letter of August 8th to this Court were received by the Clerk here until August 13th—a lapse of almost two weeks in the case of the first letter. Where these letters were in the meantime is not known. And on the very day that these delayed letters were received in the Clerk's office in this Court, that is, on August 13, 1941, the package containing the application for certiorari was also received,[54] a lapse of almost a month since petitioner says it was mailed.

Representation Concerning Certiorari Made To Kansas Federal District Court.

Following the denial of his application on June 7, 1941, in the State Supreme Court, petitioner applied to the United States District Court for Kansas for a writ of

[54] Each of the letters mentioned and the dates of receipt can be found in the Clerk's files, No. 510, October Term, 1941.

habeas corpus. On June 18, 1941, the Attorney General of Kansas moved that this application be dismissed

"for the reason that said petitioner has applied to the Supreme Court of the United States for a writ of certiorari" (Petition, page 29).[55]

On June 21, 1941 Judge Hopkins considered this motion and "upon proof offered" dismissed the application for habeas corpus. Although the Assistant Attorney General of Kansas appeared in the Federal Court on this motion, petitioner was not represented (Petition, page 30).

Just what proof was offered to forestall this application to the Federal Court of Kansas is not known. It is difficult to understand what it could have been on June 18, 1941. Petitioner says he did not put his petition in the prison mails until July 16, 1941, and we have seen it did not arrive here until August 13, 1941. Moreover, there is an original letter, attached to the petition for certiorari in this Court, from the Clerk of the Supreme Court of Kansas, dated July 1, 1941, which states that up to that date no notice of any kind had been filed indicating that petitioner would ask for certiorari (Petition, 31-32). Lastly, it was not until June 27th—nine days after State officials had represented that certiorari to the United States Supreme Court had been filed—that petitioner even moved for a rehearing in the Supreme Court of Kansas and renewed his request that his witnesses be subpoenaed (R. 63, 66). Not until July 3, 1941 was the order denying the rehearing entered by the Kansas Supreme Court.

Alleged Removal Of Documents From The Original Application For Habeas Corpus In The Court Below.

Both in his motion for rehearing in the court below (R. 63-64) and in his petition for certiorari (Pet. 6) in this Court, petitioner charges that certain of the documents attached to and supporting his application for habeas

[55] Petitioner's copy of the Motion to Dismiss and of the Journal Entry (Petition, pp. 29-30) has been compared with a certified copy from the Clerk of the District Court of the United States for the District of Kansas. It is accurate.

corpus had been removed by prison officials. On the present record it is not possible to determine with any finality whether these charges are true. With them the court below did not concern itself. There are, however, certain materials in the files of this Court which, though again resting entirely on petitioner's assertions, are consistent with and tend to support his claim. We mention two:

On August 30, 1941, after certiorari had been granted, petitioner forwarded to the Clerk of this Court copies of certain letters which he stated were part of the case and had never reached the court below. This undoubtedly referred to the charges in his motion for rehearing below and his petition for certiorari that parts of his application below had been removed. Among the letters so forwarded were copies of two documents which, if they are authentic and had been before the court below, would of themselves have been almost controlling on the question whether petitioner had attempted to appeal from his original conviction in 1933.

The first of these is a letter dated January 24, 1934—only six months after his commitment and well within the period in which appeal would have been possible—from the Warden to the State Prison Board

"enclosing herewith a petition C. H. Cochran wishes to have filed in the Supreme Court."

This letter bears the striking notice

"(Parole Attorney does not approve) Returned Jan. 27th 1934."

Although the letter mentions a "petition", petitioner states that it referred to his appeal papers (Petition, 32). Irrespective of what the returned documents were, this letter in and of itself might have established the existence of the blockade against him which petitioner alleges existed at the time.

The second letter which petitioner claims was removed from his original application and a copy of which he sent to the Clerk of this Court, is dated December 21, 1936 and

is addressed to petitioner by the State Parole Attorney. In this, the latter remarks that

"the board of administration did not prevent you from appealing your case to the Supreme court". (Petition, 33).

The significance of this letter—again if it is authentic and had been before the court below—is that it demonstrates that petitioner's claim that he had been prevented from appealing was being urged by him as early as 1936. It constitutes almost a complete answer to the suggestion of respondent in the court below that this basis for relief was first advanced in 1941 (R. 54), and corroborates petitioner's allegation that at the time of his 1935 application for habeas corpus he did know that the action of the Warden in forcibly preventing him from appealing his original conviction was illegal.

APPENDIX C.

Procedural Confusion in the Court Below.

In the present record there are numerous documents relating to petitioner's appeal from an order of the Kansas District Court which dismissed an application for habeas corpus filed on November 14, 1940, about two months before his original application in the Supreme Court of Kansas. Although we believe that the case at bar can be determined upon the record of the original application, upon which the Supreme Court of Kansas apparently based its decision, a brief review of these additional portions of the record seems warranted because it illuminates to some extent the peculiar course of consideration below of some of the questions of fact controlling the constitutional validity of petitioner's detention.

We grant that some, though by no means all, of this confusion of record results from petitioner's inartistic documents and undoubted lack of familiarity with appellate procedure. Nevertheless, where as in the court below, the applicant for habeas corpus is not represented by counsel and asserts, however inartistically, that his imprisonment is unconstitutional, we submit that the State Court should either appoint counsel for the applicant or that its clerks and other officers should be zealous in insuring that no

procedural disadvantages flow from the applicant's lack of knowledge as to proper procedure. Neither course appears to have been followed in this case. *Cf. Patterson* v. *Alabama*, 294 U. S. 600 (1935) (bill of exceptions filed too late); *Hale* v. *Kentucky*, 303 U. S. 613 (1938) (clerk's omission from record).

The record discloses that on December 11, 1940, the District Court of Leavenworth County, First District of the State of Kansas, entered an order denying petitioner's application for a writ of habeas corpus on the ground that the petition did not state facts sufficient to warrant issuance of the writ (R. 1-2). This petition had been filed on November 14, 1940 (R. 29), but its precise allegations are not disclosed. There is good reason to believe, however, that it contained substantially the same allegations as to prevention of appeal as those set forth in the original application filed on January 8, 1941 in the Supreme Court of Kansas. For the District Court Judge wrote a letter to the petitioner stating

"the matters you complain of should have been corrected by an appeal to the Supreme Court. I cannot re-try the case, and correct the errors you complain about" (R. 19).

Under Kansas practice (GEN. STAT. (Corrick, 1935) Secs. 60-3306, 07) an appeal to the Supreme Court is taken by filing a notice with the clerk of the trial court, serving a copy on the opposing party, and transmitting the notice with proof of service and a copy of the judgment or order appealed from to the Clerk of the Supreme Court. Petitioner filed a notice of appeal with the Clerk of the Kansas District Court on December 31, 1940 (R. 1), but for some unexplained reason this appeal was not formally filed in the Supreme Court of Kansas until June 2, 1941 (R. 2), five days before the final action of the Kansas Supreme Court (R. 59). Nevertheless, the appeal papers must have arrived in the Supreme Court almost three months earlier because, as already noted, on March 15, 1941, the Supreme Court of Kansas consolidated petitioner's appeal with his original application (R. 21). Instead of ordering a return by respondent, or issuing an order to show cause why the

writ should not issue,[56] the Supreme Court ordered both petitioner and respondent to file abstracts and briefs (R. 21).

Confronted with this order to file an "abstract", petitioner filed a document which substantially followed the verified Statement of Facts which had been appended to his original application, (*cf.* R. 7-13 with R. 23-29) but did so on the theory that this was the required appeal document.[58] He failed, however, to include a copy of his petition in the District Court upon the sufficiency of which the order denying his application had turned.

Respondent properly treated the consolidated case both as an original proceeding and an appeal. He filed a formal Return (R. 37) and captioned his Abstract and Brief both as "Respondent and Appellee" (R. 38).

In these circumstances it is interesting to observe that the Supreme Court of Kansas on May 5, 1941 made an entry in the consolidated case which recited that

"This cause comes on for hearing upon the appeal papers and the abstract of record from the district court of Leavenworth County and thereupon, said cause is submitted upon

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[56] See *In re Bundy*, 144 Kan. 64, 58 P. (2d) 80 (1936). In its opinion, however, the court below states that it "directed" respondent to file a return (R. 61) and a return was in fact filed.

[57] Under Kansas practice the procedure on appeal after an appeal has been docketed is for the appellant to prepare an abstract of the pleadings and of the evidence, usually in narrative form, and to file this with the court. KAN. GEN. STAT. (Corrick, 1935) Secs. 62-1704, 60-3306-10, as amended by Laws of Kansas, 1937, c. 274; Kansas Supreme Court Rules, Rule 5. It is also provided by court rules of the Supreme Court that in original cases in that court the pleadings and evidence are also abstracted unless the court otherwise orders. Nevertheless, the practice in habeas corpus seems to be to issue a show cause order or to order a return. *Cf. In re Bundy, supra.*

[58] That this is so is indicated by the subscription to the Abstract (R. 29) and by the document entitled "Abstract in Procedure of Appeal" (R. 29-30) and the accompanying brief (R. 30-36) in which he continually refers to himself as the "appellant". In the so-called Procedure Abstract petitioner states that "not being learned in court procedure, [he] may have been very informal in his petition and pleadings, but the entire petition, brief and statement of facts (Abstract) are correct in every detail" (R. 30).

the briefs of both parties and taken under advisement by the court" (R. 57).

Petitioner's "Objections to Procedure of Court", filed on May 10, 1941, have been noted (*supra*, p. 8).

In its opinion the court below stated that it considered the case as an original application for habeas corpus (R. 60). After noting that petitioner had filed the requisite notice of appeal and a copy of the judgment of the Kansas District Court, the court observed that

"Nothing further is filed respecting that appeal. The petition ruled upon by the district court is not before us. The appeal is therefore dismissed" (R. 63).

It is submitted that in view of the Court's own order of March 15, 1941 (R. 21) which had directed petitioner to file an appeal abstract, and since an examination of the record would have shown that the abstract filed was identical with the petitioner's Statement of Fact (R. 7) in the original proceeding, the action of the court below represents a confusion of form with substance. It may be assumed, however, that since it dismissed petitioner's original application, it would have affirmed the order dismissing the probably identical application in the Kansas lower court.